Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2410 OF 2009
ABDUL MALIK ISHAK, KANG HWEE GEE AND ABDUL WAHAB PATAIL JCA
31 JANUARY 2011

Banking — Banker and customer — Action by customer against banker — Credit facilities — Restructured facility agreement — Whether appellant breached obligation to pay interest

Contract — Agreement — Facility agreement — Breach — Whether there was concluded agreement — Whether operation of restructured agreement subject to conditions precedent — Whether conditions precedent fulfilled — Whether respondent breached concluded agreement by unilaterally imposing 1:1 basis term — Damages — Whether appellant proven actual damages with precise evidence — Whether appellant taken reasonable steps to mitigate loss

Since 1993 Bekalan Sains P & C Sdn Bhd ('the appellant'), a company in the cattle business was granted credit facilities by Bank Bumiputra Malaysia Bhd ('the respondent'). These credit facilities, namely, overdraft facilities ('OD facilities'), letters of credit or trust receipts (LC/TR) and banker's guarantees ('BG') were granted by way of various letters of offer from the respondent bank to the appellant. It was a term and condition of these letters of offer that the respondent was entitled by written notice to amend the existing terms and conditions and impose additional conditions. It was also a term of the loan agreement that if the appellant committed an act of default then the whole facility would become due and payable. An act of default includes the failure to pay any sums, whether principal or interest, on the due date. In December 1995, the appellant informed the respondent bank that due to considerable losses that it had incurred in its cattle business it was not in a position to settle its outstanding TRs. The appellant instead appealed for a restructuring of its credit facilities with the respondent. The respondent bank did not agree to restructure the facilities and decided to take legal action against the appellant and the guarantors in order to recover the outstanding sums. Thereafter there followed a period of lengthy negotiations between the parties, which led to the letter of offer dated 26 February 1996 from the respondent to the appellant wherein the former offered to restructure the total loan and banking facilities amounting to RM8.8m. On 26 April 1996, the respondent bank informed the appellant that it was directed by its head office to impose a 1:1 term, which

meant that the appellant had to deposit RM100 with the respondent bank for every RM100 value of LC it required to be issued, and that the appellant had to pay a monthly sum of RM15,000 towards servicing the interest as a condition of the restructuring. The respondent's letter dated 26 April 1996 gave rise to the present proceedings before the High Court. It was the appellant's case that the respondent had acted in breach of the restructured agreement by its imposition of the 1:1 basis term. The appellant submitted that the respondent's letter of offer dated 26 February 1996, which had been accepted by the appellant, had the necessary elements of a concluded contract and that the respondent bank had evinced a clear intention of departing from the expressed terms of this restructured agreement when it unilaterally imposed the 1:1 basis term. The appellant contended that the breach of the restructured facility agreement by the respondent had resulted in the appellant suffering damages in the sum of RM21,528,000. The respondent bank submitted that the appellant never complied with the conditions precedent as well as the fundamental terms of the restructured agreement. The respondent argued that the appellant had not paid the RM15,000 a month that it had agreed to pay as interest and that this was a condition of the restructuring. The respondent further argued that the appellant's breach of its obligation to pay the monthly sum of RM15,000 towards servicing the interest would run counter to the terms of the restructured agreement, which would entitle the respondent to recall the entire facilities and suspend further credit but that instead of doing so it had levied the 1:1 condition. After a full trial the High Court judge dismissed the appellant's claim with costs in the sum of RM100,000 and hence the present appeal.

Held, dismissing the appellant's appeal with costs:

(1) The factual matrix forming the background of the transaction is not to be confined to the restructured agreement dated 26 February 1996 but should extend to the other documents and circumstances pertaining to the transactions between the appellant and the respondent. From the exchange of letters between the parties it was clear that the appellant was fully aware of its obligations to pay RM15,000 a month as interest. In fact the appellant had admitted that it was in arrears in paying the RM15,000 a month and asked the respondent for time to make payment. Since it is an admission adverse to the appellant, it was admissible as an exception to the hearsay evidence rule under s 17 of the Evidence Act 1950. From the evidence it was clear that the appellant had completely misunderstood the letter of offer dated 26 February 1996. The appellant thought that it had only to accept the offer by passing a directors' resolution but failed to appreciate that it had to submit to the respondent bank the duly executed and stamped fresh guarantee and the supplementary facility agreement (SFA) and pay the RM15,000 with effect from January 1996. Since, as at 8 April 1996 the appellant had failed to pay the RM15,000 and the terms

of the fresh guarantee and the SFA were not finalised the appellant had issued its letter dated 26 April1996 requiring the appellant to pay the arrears of RM15,000 and imposing the 1:1 condition. From the facts it was thus clear that the operation of the restructured agreement was subject to certain conditions precedent and these conditions precedent had not been fulfilled (see paras 121, 122, 129–136 & 178–180).

(2) The present case involved a banker customer relationship and it was settled law that a bank had the right to withhold further drawdown when a borrower had breached its obligation to pay interest (see paras 181–183).

(3) In order to justify an award of substantial damages the appellant/claimant had to satisfy the court as to the fact of damage and as to its quantum. However, instead of providing sufficient data for the court to assess damages the appellant only submitted self-serving statements by the appellant's own officers which had no probative value. In order to prove the existence of a market for cattle and the market value of cattle, the appellant ought to have called independent experts to testify by giving the basis of the valuation, or customers to testify as to the price they were prepared to pay but the appellant had failed to prove damages with precise evidence (see paras 189–191 & 206–208).

(4) The appellant's argument that the respondent caused the loss of the poultry contract also could not stand since that venture was financed by another bank (see para 210).

(5) The appellant's claims of loss from the sale of the charged properties at an undervalue by the respondent must be dismissed as no evidence was led to show that the market value of the properties on the dates of sale were any different from the prices obtained (see para 211).

(6) The claim for damages for upliftment of the fixed deposits had no basis in law and should be dismissed (see para 212).

(7) The appellant was duty bound to take all reasonable steps to mitigate the loss suffered consequent upon the respondent bank's purported breach of contract but the appellant did not do so (see paras 213–214).

[Bahasa Malaysia summary

Sejak tahun 1993 Bekalan Sains P & C Sdn Bhd ('perayu'), sebuah syarikat yang menjalankan perniagaan menternak lembu telah diberikan kemudahan kredit oleh Bank Bumiputra Malaysia Bhd ('responden'). Kemudahan kredit itu, iaitu kemudahan overdraf ('kemudahan OD'), surat kredit atau resit amanah (LC/TR) dan jaminan bank ('JB') telah diberikan melalui pelbagai surat tawaran daripada responden bank kepada perayu. Adalah terma dan syarat surat-surat tersebut bahawa responden berhak melalui notis bertulis untuk meminda terma dan syarat sedia ada dan mengenakan syarat tambahan.

Ia juga merupakan terma dalam perjanjian pinjaman bahawa jika perayu melakukan tindakan keingakaran maka keseluruhan kemudahan menjadi terhutang dan perlu dibayar. Tindakan keingkaran termasuklah kegagalan untuk membayar apa-apa jumlah, sama ada principal atau faedah, pada tarikh perlu dibayar. Dalam bulan Disember 1995, perayu telah memberitahu responden bank bahawa akibat daripada kerugian agak besar yang ditanggung olehnya dalam perniagaan menternak lembu itu ia tidak berada dalam kedudukan untuk menyelesaikan baki TRnya. Perayu sebaliknya merayu untuk penstrukturan semula kemudahan kreditnya dengan responden. Responden bank tidak bersetuju untuk menstruktur semula kemudahan itu dan memutuskan untuk mengambil tindakan undang-undang terhadap perayu dan penjamin-penjamin bagi tujuan mendapat balik baki jumlah. Berikutan itu terdapat rundingan untuk tempoh yang lama antara pihak-pihak, yang berakhir dengan surat tawaran bertarikh 26 Februari 1996 daripada responden kepada perayu di mana responden menawarkan penstrukturan semula jumlah pinjaman dan kemudahan perbankan berjumlah RM8.8 juta. Pada 26 April 1996, responden bank memberitahu perayu bahawa ia diarahkan oleh ibu pejabatnya untuk mengenakan syarat 1:1, yang bermaksud bahawa perayu hendaklah mendepositkan RM100 dengan responden bank untuk setiap nilai RM100 LC yang perlu dikeluarkan, dan bahawa perayu perlu membayar jumlah bulanan sebanyak RM15,000 untuk khidmat faedah sebagai syarat penstrukturan semula itu. Surat responden bertarikh 26 April 1996 membawa kepada prosiding ini dimulakan di hadapan Mahkamah Tinggi. Adalah kes perayu bahawa responden telah bertindak melanggar perjanjian penstrukturan semula itu dengan syarat asas 1:1 yang dikenakannya. Perayu berhujah bahawa surat tawaran responden bertarikh 26 Februari 1996 yang telah diterima oleh perayu mempunyai elemen-elemen yang diperlukan untuk melaksanakan kontrak itu dan bahawa responden bank telah memperlihatkan niat jelas untuk melencong daripada terma-terma yang dinyatakan dalam perjanjian penstrukturan semula ini apabila ia secara unilateral mengenakan syarat asas 1:1. Perayu menegaskan bahawa pelanggaran perjanjian kemudahan oleh responden telah mengakibatkan perayu mengalami kerugian berjumlah RM21,528,000. Responden bank berhujah bahawa perayu tidak pernah mematuhi pra syarat dan juga terma penting perjanjian penstrukturan semula itu. Responden berhujah bahawa perayu tidak membayar secara bulanan RM15,000 yang telah dipersetujuinya sebagai faedah dan bahawa ini merupakan syarat penstrukturan semula itu. Responden selanjutnya berhujah bahawa pelanggaran perayu terhadap tanggungjawabnya membayar jumlah bulanan RM15,000 untuk faedah adalah bertentangan dengan terma-terma perjanjian penstrukturan semula, yang memberi hak kepada responden untuk mendapat balik keseluruhan kemudahan dan menggantung kredit selanjutnya tetapi sebaliknya ia telah mengenakan syarat 1:1 itu. Selepas perbicaraan penuh hakim Mahkamah

Tinggi telah menolak tuntutan perayu dengan kos berjumlah RM100,000 dan justeru rayuan ini dikemukakan.

Diputuskan, menolak rayuan perayu dengan kos:

(1) Matriks faktual yang membentuk latar belakang transaksi tidak terbatas kepada perjanjian penstrukturan semula bertarikh 26 Februari 1996 tetapi patut dilanjutkan kepada dokumen dan keadaan lain berkaitan dengan transaksi-transaksi antara perayu dan responden. Berdasarkan pertukaran surat-surat antara pihak-pihak adalah jelas bahawa perayu sedar sepenuhnya tentang tanggungjawabnya untuk membayar RM15,000 sebulan sebagai faedah. Bahkan perayu telah mengakui bahawa ia berhutang dalam membayar RM15,000 sebulan dan memohon agar responden mencari masa untuk membuat bayaran. Oleh itu ia merupakan pengakuan bertentangan terhadap perayu, ia boleh diterima sebagai pengecualian terhadap rukun bukti dengar cakap di bawah s 17 Akta Keterangan 1950. Berdasarkan keterangan adalah jelas bahawa perayu langsung tidak memahami surat tawaran bertarikh 26 Februari 1996 itu. Perayu fikirkan bahawa ia hanya perlu menerima tawaran itu dengan meluluskan resolusi pengarah tetapi gagal untuk menyedari bahawa ia perlu mengemukakan kepada responden bank gerenti dan perjanjian kemudahan tambahan ('PMT') yang telah disempurna dan dimatikan setem dan membayar RM15,000 bermula dari Januari 1996. Oleh kerana, sehingga 8 April 1996 perayu telah gagal membayar RM15,000 dan terma-terma gerenti baru dan PKT tidak disempurnakan perayu telah mengeluarkan suratnya bertarikh 26 April 1996 menghendaki perayu membayar baki tertunggak RM15,000 dan mengenakan syarat 1:1 itu. Berdasarkan fakta adalah jelas bahawa operasi perjanjian penstrukturan semula itu tertakluk kepada pra syarat tertentu dan pra syarat tersebut tidak dapat dipenuhi (lihat perenggan 121–122, 129–136 & 178–180).

(2) Kes ini melibatkan hubungan pegawai bank dan pelanggan dan adalah undang-undang tetap bahawa bank mempunyai hak untuk menahan pengambilan selanjutnya apabila peminjam melanggar tanggungjawabnya untuk membayar faedah (lihat perenggan 181–183).

(3) Bagi tujuan menjustifikasikan award untuk ganti rugi yang besar perayu/penuntut perlu meyakinkan mahkamah terhadap fakta ganti rugi dan kuantumnya. Walau bagaimanapun, perayu tidak mengemukakan data mencukupi untuk mahkamah menaksir ganti rugi tetapi hanya mengemukakan kenyataan untuk pihak sendiri oleh pegawai-pegawai perayu sendiri yang tiada nilai probatif. Bagi tujuan membuktikan terdapat pasaran penternakan lembu dan nilai pasaran menternak lembu, perayu patut memanggil pakar berasingan untuk memberi keterangan melalui penaksiran asas atau pelanggan untuk memberi keterangan

tentang harga yang mereka sanggup bayar tetapi perayu telah gagal untuk membuktikan ganti rugi dengan keterangan yang tepat (lihat perenggan 189–191 & 206–208).

(4) Hujah perayu bahawa responden telah menyebabkan kehilangan kontrak ayam juga tidak dapat dikekalkan kerana usaha itu telah dibiayai oleh bank lain (lihat perenggan 210).

(5) Tuntutan kerugian perayu daripada jualan hartanah yang digadaikan pada nilai di bawah harga pasaran oleh responden patut ditolak kerana tiada bukti untuk menunjukkan bahawa nilai pasaran hartanah pada tarikh-tarikh jualan adalah berbeza dengan harga-harga yang diperoleh (lihat perenggan 211).

(6) Tuntutan ganti rugi untuk kenaikan deposit tetap tidak berasas dari segi undang-undang dan patut ditolak (lihat perenggan 212).

(7) Perayu terikat kepada kewajipan untuk mengambil segala langkah berjaga-jaga untuk meringankan kerugian yang dialami akibat pelanggaran kontrak responden bank tetapi perayu tidak berbuat demikian (lihat perenggan 213–214).]

Notes

For cases on action by customer against banker, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2087–2094.

For cases on facility agreement, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2483–2486.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1, FC (refd)

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47, PC (refd)

Albacruz (Cargo Owners) v Albazero (Owners), The Albazero [1977] AC 774, HL (refd)

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)

Ban Chuan Trading Co Sdn Bhd & Ors v Ng Bak Guan [2004] 1 MLJ 411; [2003] 4 CLJ 785, CA (refd)

Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Anor [1993] 2 MLJ 76; [1993] 2 CLJ 495, SC (refd)

Bank of China v Lee Kee Pin [1961] MLJ 40 (refd)

Bank of Credit and Commerce International SA v Munawar Ali and others [2001] 2 WLR 735, HL (refd)

British Westinghouse Electric And Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited [1912] AC 673, HL (refd)

A *Cambridge Nutrition Limited v British Broadcasting Corp* [1990] 3 All ER 523, CA (refd)
Carr v Carr (1811) 1 Mer 625 (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)
B *Commissioners of Taxation v English, Scottish and Australian Bank, Limited* [1920] AC 683, PC (refd)
Danaharta Urus Sdn Bhd v Kekatong Sendirian Berhad [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)
Darbishire v Warren [1963] 1 WLR 1067, CA (refd)
C *Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293; [2005] 1 CLJ 501, CA (refd)
Eagle Trust Plc v SBC Securities Ltd [1991] BCLC 438 (refd)
Edward Thomas Foley v Thomas Hill and Others (1848) 2 HL Cas 28, HL (refd)
El Ajou v Dollar Land Holdings plc and another [1994] 2 All ER 685, CA (refd)
D *Great Western Railway Company, The v The London and County Banking Company, Limited* [1901] AC 414, HL (refd)
Governor and Company of the Bank of Scotland v A Ltd and others [2001] 1 WLR 751, CA (refd)
Hay or Bourhill v Young [1943] AC 92, HL (refd)
E *Hong Kong Fir Shipping Company, Ltd v Kawasaki Kisen Kaisha, Limited* [1962] 1 All ER 474; [1962] 2 QB 26, CA (refd)
Importers Company, Limited v Westminster Bank, Limited [1927] 2 KB 297, CA (refd)
F *John Pym v Robert James Roy Campbell, James Thompson Mackenzie and Richard Pastor Pritchard* (1856) 6 El & Bl 370 (refd)
Koh Kim Chai v Asia Commercial Banking Corporation Limited [1981] 1 MLJ 196, FC (refd)
Koh Kim Chai v Asia Commercial Banking Corporation Limited [1984] 1 MLJ 322, PC (refd)
G *Ladbroke And Co v Todd* (1914) 30 TLR 433 (refd)
Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & 353 Ors [2009] 4 MLJ 610; [2009] 5 CLJ 1; [2010] 1 AMR 285, CA (refd)
H *Lim Chee Holdings Sdn Bhd v RHB Bank Bhd* [2005] 6 MLJ 497; [2005] 4 CLJ 305, CA (refd)
Livingstone v Rawyards Coal Company (1880) 5 App Cas 25, HL (refd)
Malayan Banking Berhad v P K Rajamani [1994] 1 MLJ 405; [1994] 2 CLJ 25, SC (refd)
I *Manchester Trust v Furness* [1895] 2 QB 539, CA (refd)
MBf Finance Berhad v Low Ping Ming [2005] 3 MLJ 208; [2005] 1 CLJ 305, CA (refd)
Nalamah d/o Sangapillay (deceased) v Cheok Toh Gong & Ors [1996] 1 MLJ 843, SC (refd)

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211; [1983] CLJ 282 (Rep); [1983] 2 CLJ 76, FC (refd)
Partenreederei M S Karen Oltmann v Scarsdale Shipping Co Ltd [1976] 2 Lloyd's Rep 708 (refd)
Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi Ahmad & Ors [2005] 2 MLJ 32; [2005] 1 CLJ 416, CA (refd)
Popular Industries Limited v The Eastern Garment Manufacturing Co Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635, HC (refd)
Property & Bloodstock Limited v Emerton, Bush And Another v Property & Bloodstock Ltd And Others [1968] 1 Ch 94, CA (refd)
Redmond v Allied Irish Banks Plc [1987] FLR 307 (refd)
Robinson v Midland Bank, Limited (1925) 41 TLR 402 (refd)
Rubber Industry (Replanting) Board, The v Hongkong and Shanghai Banking Corporation [1957] MLJ 103 (refd)
Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (Formerly STC Submarine Systems Ltd) [1999] 2 Lloyd's Rep 423 (refd)
Skips A/S Nordheim And Others v Syrian Petroleum Company Limited And Another [1984] 1 QB 599, CA (refd)
Smith v Hughes [1861–73] All ER Rep 632 (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (refd)
Storer v Manchester City Council [1974] 3 All ER 824; [1974] 1 WLR 1403, CA (refd)
Subramaniam v Public Prosecutor [1956] MLJ 220 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)
United Dominions Trust, Limited v Kirkwood [1966] 1 All ER 968; [1966] 2 QB 431, CA (refd)
William Devaynes and Louisa his Wife, and Thomas Monsell (an Infant) v WM Noble, Sam Pepys Cockerell, Fred Booth, Mary Devaynes, Elizabeth Smith, Lestock Wilson, John Morris, and Joseph Down; Sir Thomas Baring, Bart, and Sir Frank Standish, Bart (on behalf of themselves, and all other the Creditors of the partnership of William Devaynes, John Dawes, William Noble, Richard Henry Croft, and Richard Barwick, who shall come in and contribute, & e) v The said William Noble, Samuel Pepys Cockerell, Frederick Booth, Lestock Wilson, John Morris, Joseph Dorien, WM Devaynes, and Louisa his Wife, Mary Devaynes, Elizabeth Smith, and Thomas Monsell (1816) 1 Mer 529 (refd)
Woods v Martins Bank Limited And Another [1958] 3 All ER 166; [1959] 1 QB 55 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 2(1)
Banking Ordinance 1958 s 3
Bills of Exchange Act 1949
Contracts Act 1950 ss 32, 33, 83

A Evidence Act 1950 (Act 56) ss 17, 64
Stamp Act 1949

Appeal from: Suit No D6(D1)–22–2531 of 1999 (High Court, Kuala Lumpur)

B

M S Murthi (Ranjan Chandran with him) (Chambers of Murthi & Partners) for the appellant.

Nitin V Nadkarni (Darshendev Singh with him) (Lee Hishammuddin Allen & Gledhill) for the respondent.

C

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

D

[1] After a full trial, the learned High Court judge dismissed the plaintiff's claim with costs in the sum of RM100,000 payable by the plaintiff to the defendant bank. Aggrieved by the decision, the plaintiff (now the appellant before us) filed an appeal against the whole decision of the learned judge of the E High Court.

[2] Before us, learned counsel on both sides argued the appeal at great length. It is quite natural that the defendant bank (now the respondent bank before us) F supported the decision of the learned judge of the High Court.

THE FACTS AND THE ANALYSIS THERETO

[3] The appellant, as the customer of the respondent bank, had applied for G and had been granted credit facilities since 1993, inter alia, to facilitate the appellant's core business and that would be: trading in imported livestock. The banker-customer relationship between the appellant and the respondent bank went a long way.

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[4] On the appellant's application, the respondent bank approved on 21 April 1993 the following facilities in favour of the appellant, namely: overdraft, letter of credit/trust receipt ('LC/TR') and banker's guarantee ('BG'). The breakdown are as follows:

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(a) Overdraft —— RM200,000

(b) LC(sight)/TR (120 days) ——RM500,000

(c) BG —— RM100,000

[5] On 16 November 1993, the respondent bank gave additional credit facilities to the appellant, namely:

(a) Overdraft —— RM300,000

(b) LC(sight)/TR (120 days) ——RM500,000

[6] The combined facilities granted to the appellant by the respondent bank came up to:

(a) Overdraft of RM500,000

(b) LC/TR of RM1,000,000

[7] And these two facilities were secured by the following properties:

(a) PT No 7 mukim of Damansara, district of Petaling;

(b) Flat No 306 block No 7, section 8, Shah Alam;

(c) Lot No 4372, geran 4545, mukim of Bidor, district of Balang Padang;and

(d) Lot No 50679, title HS(M) UK 367/74, mukim and district of Kinta.

[8] On 14 July 1994, the facilities granted by the respondent bank were dramatically increased in favour of the appellant. And the list itemised below shows that dramatic increase:

(a)	Overdraft	——	RM1,500,000
(b)	LC/TR (120/90) days (sight/issuance 120 days)	——	RM4,000,000
(c)	BG (tender)	——	RM200,000
			RM5,700,000

[9] And these facilities were secured by the following two properties:

(a) Four storey shophouse vide PT No 113, mukim of Damansara, Petaling; and

(b) A condominium unit at parcel B9-06 Fajaria, PT No 1797, Kuala Lumpur.

[10] On 16 March 1995, an additional facility of RM1,500,000 was approved by the respondent bank to the appellant. And the additional security advanced by the appellant to the respondent bank was a piece of land at Lot No 11317, mukim of Damansara, Petaling.

[11] In short, by various letters of offers the respondent bank gave the

appellant overdraft facilities, LC/TR and BG. It was a term and condition of the letters of offers that the respondent bank was entitled by written notice to amend the existing terms and conditions and impose additional conditions.

[12] In regard to the letter of offer by the respondent bank dated 21 April 1993 as seen at pp 445–451 of the appeal record at Bahagian 'C' at Jilid 2/15, cl (e) is worded in this way and it is in favour of the respondent bank:

> (e) The bank reserves the right to amend the existing terms and conditions and to impose additional clauses on the above facilities by notice in writing.

[13] The letter of offer by the respondent bank dated 16 November 1993 can be seen at pp 553–559 of the appeal record at Bahagian 'C' at Jilid 3/15 and cl (e) therein reserves to the respondent bank 'the right to amend the existing terms and conditions and to impose additional clauses on the above facilities by notice in writing'. It is obvious that this cl (e) is similarly worded just like cl (e) as found in the letter of offer dated 21 April 1993.

[14] The letter of offer by the respondent bank to the appellant dated 14 July 1994 can be seen at pp 652–660 of the appeal record at Bahagian 'C' at Jilid 4/15 and cl (d) therein is similarly worded just like cl (e) of the letter of offer dated 21 April 1993.

[15] Finally, the letter of offer dated 16 March 1995 as seen at pp 844–847 of the appeal record at Bahagian 'C' at Jilid 5/15 spilling over to pp 848–859 of the appeal record at Bahagian 'C' at Jilid 6/15 contains cl (iv) which is also similarly worded just like cl (e) of the letter of offer dated 21 April 1993.

[16] The loan agreement dated 5 July 1993 between the respondent bank and the appellant can be seen at pp 466–503 of the appeal record at Bahagian 'C' at Jilid 2/15 and cl 2.4 stipulates as follows:

> 7.2.4 the Bank is satisfied that no event has occurred so as to render the Banking Facilities to become immediately repayable and that the Borrower, Chargor, any of the Guarantors are in default under any agreement to which they are a party or by which they may be bound and no litigation, arbitration or administrative proceedings are presently current or pending or threatened which default, litigation, arbitration or administrative proceedings, as the case may be, might in the opinion of the Bank (which opinion shall not be questioned on any account whatsoever) materially affect the assets of the Borrower, the said business or the solvency of the Borrower, Chargor, and/or the guarantors or might affect the ability of the Borrower, Chargor and/or the guarantors to perform their respective obligations under the security documents.

[17] While the loan agreement dated 19 January 1994 between the respondent bank and the appellant can be seen at pp 574–612 of the appeal record at Bahagian 'C' at Jilid 3/15 and cl 7.2.4 therein is worded exactly like cl 7.2.4 of the loan agreement dated 5 July 1993.

[18] These two loan agreements — referring to the loan agreements dated 5 July 1993 and 19 January 1994, stipulate, inter alia, that the obligations of the respondent bank to continue to make available the facilities to the appellant are subject to no event occurring that would render the banking facilities immediately payable and also subject to the requirement that no default by the appellant of any of the terms in the agreements.

[19] Clause 10.1.1 of the loan agreement dated 5 July 1993 is worded exactly like cl 10.1.1 of the loan agreement dated 19 January 1994 and it merits reproduction (see p 490 of the appeal record at Bahagian 'C' at Jilid 2/15 and p 599 of the appeal record at Bahagian 'C' at Jilid 3/15):

> 10.1 if default be made in payment of any moneys payable on due dates under the provisions hereof whether formally demanded or not.

[20] What it amounts to is this. That the whole facilities would become due and payable if the appellant were to commit any of the list of defaults including the failure to pay any sums on the due date, whether of interest or principal.

[21] The facility agreement dated 29 August 1994 between the appellant and the respondent bank (see pp 678–725 of the appeal record at Bahagian 'C' at Jilid 4/15) and the facility agreement dated 15 April 1995 between the respondent bank and the appellant (see pp 869A–904 of the appeal record at Bahagian 'C' at Jilid 6/15) provide, inter alia, that (a) the obligation on the part of the respondent bank to continue to make the facilities available to the appellant was subject to the appellant not defaulting on any of the agreements; and (b) the respondent bank was entitled to suspend further utilisation of the facilities or any portion thereof by giving the requisite written notice in the event the appellant was found committing an act of default.

[22] Clause 4.2.3 of the facility agreement dated 29 August 1994 is similarly worded with cl 4.2.3 of the facility agreement dated 15 April 1995 and it is appropriate to reproduce that clause:

> 4.2.3 that neither the Borrower nor any of the Guarantors are in default under any agreement to which they are a party or by which they may be bound and no litigation, arbitration or administrative proceedings are presently current or pending or threatened which default, litigation, arbitration or administrative proceedings, as the case may be, might in the opinion of the Bank (which opinion shall not be questioned on any account whatsoever) materially affect the

assets of the Borrower, its business or the solvency of the Borrower or the Guarantors or might affect the ability of the Borrower or the Guarantors to perform their respective obligations under the Security Documents.

[23] Clause 8.3.3 of the facility agreement dated 29 August 1994 talks of an event of default and it is ideal to reproduce that clause:

8.3 If an Event of Default shall occur and be continuing, the Bank may by written notice to the Borrower:-

8.3.3 suspend further utilisation of the Banking Facilities or any portion thereof, such suspension to be effective upon the giving of such notice and to continue for such period or periods as the Bank may, in its sole discretion, decide.

[24] An act of default is set out in a long list of defaults which includes the failure to pay any sums on the due date as set out in cl 8.1.1 of the facility agreement dated 29 August 1994. Clause 8.1.1 is worded in this way:

8.1.1 If default be made in payment of any moneys payable on due dates under the provisions hereof whether formally demanded or not.

[25] One of the conditions of the TRs was this. That the TRs were to be repaid with interest within 120 days of issuance. After the additional facility was given on 16 March 1995, the appellant defaulted in repayment of the TRs and the respondent bank classified the account as a non-performing loan ('NPL') in August 1995.

[26] By letter dated 5 December 1995, the appellant informed the respondent bank that the appellant was in no position to settle these outstanding TRs and the appellant appealed for a restructuring of the outstanding TRs by:

(a) servicing only the current monthly interest for the period from January 1996 to August 1996; and

(b) thereafter, from September 1996, the appellant was to commence payment on the overdue TRs by way of sixteen equal quarterly instalments.

[27] The appellant's letter to the respondent's bank dated 5 December 1995 can be seen at pp 989–992 of the appeal record at Bahagian 'C' at Jilid 7/15 and that letter was worded in this way:

Dear Sir,

Re: Overdue Trust Receipts

Your letter dated 2nd December, 1995 refers.

As you might be aware, we are in no position at present to settle the full amount of the overdue T/R on immediate basis. Upon reviewing the financial position prepared by our auditor, we regret to inform you that we have incurred considerable losses in our cattle business due to the following reasons:

(1) Bad Debts

We are faced with problems in collection. Some of the account(s) had to be classified as bad. In one of the cases we were hit by a syndicate who purposely made use of our supply with the intention not to pay us back. We have reported this matter to the police as well as seeking legal action. For retail debtors, we are currently pursuing direct collection by sending our people chasing after them.

(2) Misappropriation of Fund

We have also experienced cases on misappropriation of fund(s) by our people in Bidor. Our Internal Auditor had identified the responsible employees and appropriate action will be taken to recover our money(s) from them.

(3) Syndicate Selling

We were hit by an internal syndicate who were selling our livestocks at below our selling price. Some even below than our buying price. The excuses for selling cheap were bad health, loss weight and poor demand. There is a possibility where the syndicate would have eventually collected the difference for themselves. Currently, we could not produce hard evidence to (implicate) the people involved. However, the matter is still under investigation.

(4) Escalating Cost

We were also being hit by escalating cost especially in transportation and feeding cost. Due to our inexperience in dealing with our supplier from Australia, we were trapped in paying higher price for our catties. We have however failed to recover this increase in cost due to market competition. We were forced to sell at competitive price in order to avoid bigger losses.

Besides the above, we admitted our fault for not able to control the above situation. Despite high overheads spent by the company, we failed to put our resources into the optimum. Lack of knowledge in financial control has caused us the above losses.

As we cannot allow the above events to stop us from continuing our business, our Board of Directors had agreed to restructure our operation by concentrating ourselves into contract business where the payment is more secured and easy to handle.

We are therefore planning the following course of actions:

(1) Supply of Chicken to Kretam Holding Berhad

We are now in the midst of negotiating to supply 1.5 Million birds of mature chicken per month to Kretam Holding for their chicken processing plant in Johore Bahru Wholesale Market. This deal which is expected to commence by October, 1996 will provide a net profit of between RM350,000 to RM450,000 a month to us. We had made the necessary arrangement to secure this contract.

(2) Supply of Cattle to Perak SADC

We are also in the midst of negotiating to supply 2,500 heads of cattle a month to Perak State Agriculture Development Corporation (SADC) for their slaughtering house in Lumut. This project is expected to take off the ground by September, 1996.

(3) Supply of Animal Feeds and Feed Suplements

As we have the necessary experience in handling the above business and are also the registered supplier with the government, we shall continue and will put more efforts in securing tenders for 1996 and 1997. We are currently still under contract to supply feed supplement to Veterinary Department for 1995 and contract to supply animal feeds and feed supplements to Pusat Latihan Haiwan, Sg Siput for their 1995-1996 requirements).

Beside chicken and cattle, we also deal in animal feed and feed supplement for horse. As demand for this service is promising, our company will put more efforts in exploring this business. At the moment we are the supplier for Ampang Polo Club.

(4) Supplier of Drugs for Animal

As we are the representative to few overseas suppliers, we shall continue this business to complement our existing business.

(5) Contract Farming

To make full use of our feedlot facilities in Bidor we shall offer contract farming as part of our business. We hope with the oncoming of PPRT project (Projek Pembangunan Rakyat Termiskin), we shall become the supplier and half-way caterer for this project

(6) Farm Management Services

With the recruitment of a Veterinary Doctor into our company, we had established Farm Management Services Department to provide advisory on livestock farming to smallholders. For this matter, we are currently at the negotiation stage to provide complete package on feedlot system to the Jengka Authority, Pahang. The project is expected to generate a turnover of RM2 Million.

With the foregoings, we believe the bank will be satisfied with our explanations for the delay and on our action plan to put the company into its right footing.

We at this juncture, would also like to appeal to (the) bank (to) allow us to pay the outstanding T/R progressively, preferably in the following manner:

(1) From January 1996 to August 1996 servicing only the current month interest due.

(2) From September 1996 to commence payment on outstanding T/R and overdue interest in 16 equal quarterly instalments.

We hope, with the anticipation that the existing security will also increase in value, the bank will consider the above appeal favourably as this problem has somehow put our business into a standstill.

Thank you.

[28] The respondent bank did not remain idle. It responded. And by its solicitors' letters dated 27 December 1995 and 17 January 1996, the respondent bank demanded payment of the sums outstanding under the overdue TRs.

[29] The respondent bank solicitor's letter dated 27 December 1995 to the appellant can be seen at pp 998–999 of the appeal record at Bahagian 'C' at Jilid 7/15 and it was worded in this way:

"Dear Sirs,

Re: Banking Facilities Totalling RM5.7 Million
Trust Receipts Overdue Totalling RM3,996,596-00 as at 30th November, 1995

We act for Bank Bumiputra Malaysia Berhad of Nos. 48 & 50, Jalan SS 21/35, Damansara Utama, 47400 Petaling Jaya, Selangor Darul Ehsan.

We were informed by our client that upon your request, our client has granted you a Banking Facilities Agreement totalling RM5.7 million via Facility Agreement dated 29th August 1994 on the terms and conditions as stated in the abovesaid Facilities Agreement (and) the details are as (follows):-

Type	Amount
Overdraft	RM1,500,000-00
LC/TR (120/90 days)	RM4,000,000-00
BC (Tender)	RM 200,000-00
	RM5,700,000-00

We were further informed that there is an overdue Trust Receipt amounting to RM3,996,596-00 as at 30th November 1995 in respect of the above facility and despite numerous request from our client you have failed/refused and/or neglected to settle the said overdue.

Therefore, we have our client's instruction to demand from you which we hereby do, the said overdue Trust Receipt of RM3,996,596-00 and RM100-00 being our cost of this demand letter to be paid to us as their Solicitors.

TAKE NOTICE that unless you fully settle the overdue Trust Receipt of RM3,996,596-00 with interest thereon at 2.5% above the Bank Base Lending Rate (currently is at 6.90%) per annum and overdue interest rate at 1.00% per annum from the date of maturity until full settlement together with RM100-00 being cost of this demand letter to our client or to us as their Solicitors within Fourteen (14) days of this date hereof, we shall commence legal proceedings against you without further reference in which event you shall also be liable for all costs and expenses incurred.

Yours faithfully."

[30] And the respondent bank solicitor's letter dated 17 January 1996 to the appellant can be seen at p 1002 of the appeal record at Bahagian 'C' at Jilid 7/15 and it was worded in this fashion:

> **"Dear Sirs,**
>
> **Re: Banking Facilities Totalling RM5.7 Million**
> **Trust Receipts Overdue Totalling RM3,996,596-00**
> **as at 30th November, 1995**
> **==========**
> **We refer to the above matter and to our Letter of Demand dated 27th December 1995, (a copy of the said letter enclosed herewith).**
>
> **We were informed by our client that till todate you have failed/refused and/or neglected to settle the outstanding due and payable to our client.**
>
> **TAKE NOTICE that unless you fully settle the outstanding sum of RM3,996,596-00 with interest thereon at 2.5% above the BLR (currently at 6.90%) per annum and overdue interest of 1.00% per annum together with RM100-00 being cost of this demand letter to our client or to us as their solicitors within fourteen (14) days of this date hereof, we have strict instruction(s) from our client to commence legal proceedings against you without further reference in which event you shall also be liable for all costs and expenses incurred.**
>
> **Yours faithfully."**

[31] The respondent bank did not agree to restructure the facilities and decided to take legal action against the appellant and the guarantors in order to recover the outstanding sums.

[32] The appellant sought political assistance to persuade the respondent bank to restructure the loan. A memo dated 3 October 1995 from Datuk Haji Ahmad Zahid Hamidi as seen at p 961 of the appeal record at Bahagian 'C' at Jilid 7/15 bears testimony to this. That letter was worded as follows:

"DARI MEJA
DATUK HAJI AHMAD ZAHID HAMIDI
DMSM, AMN, PJK, PPT

MEMO

Kepada: Tuan Haji Mohd. Nor Abd. Wahid Tarikh: 3-10-1995

Perkara: Rayuan.

Saya harap dan mohon saudara dan keluarga sihat sejahtera.

2. Izinkan saya untuk merayu bagi pihak syarikat Bekalan Sains P & C Sdn. Bhd. yang merayu untuk dijadualkan semula pinjaman syarikat berkenaan.

3. Syarikat saya, KRETAM HOLDINGS BHD. akan menandatangani MOU dengan syarikat berkenaan untuk membekalkan sebanyak 1.5 ekor ayam sebulan untuk suatu tempoh yang panjang bagi kegunaan untuk chicken processing plant di Pasar Borong J.B. atas dasar penswastaan dengan Majlis Bandaraya J.B.

4. Harap diberikan pertimbangan khas.

Sgd. Illegible
DATUK HAJI AHMAD ZAHID HAMIDI
Pengerusi
Bank Simpanan Nasional
Malaysia

AKI
Customer is coming to see me on 11/10/95 at 5.30 pm. I want you and Azizi to attend.

Sgd. Illegible
HJ. MOHD. NOR ABDUL WAHID

Encik Shu ....
Please join the meeting (11/10/95 at 5.30 pm)

T.Q.

Sgd. Illegible
10/10/95."

[33] On 30 January 1996, the appellant proposed to restructure the facilities in this manner:

(a) there would be a moratorium in respect of the outstanding TRs until the end of January 1997;

(b) that the appellant would pay RM180,000 towards interest throughout the course of 1996 in varying instalments;

(c) that in January 1997, the marginal deposit of RM502,295.25 would be set off against the total outstanding TRs and interest thereon and the balance would be converted into a term loan repayable over a period of five years; and

(d) the appellant represented that its venture to supply chickens to Kretam was taking shape.

[34] An internal memorandum was then prepared by the respondent bank for presentation to the respondent bank's credit committee. That internal

memorandum was dated 10 February 1996 and it was prepared for the purpose of seeking approval to restructure the facilities.

[35] It was recorded in the internal memorandum that although the interest accrued on the LC/TR facilities at the rate of RM44,378 per month, the appellant was proposing to pay interest of RM15,000 a month with effect from 1 January 1996 and had agreed that the shortfall would be set off against the fixed deposits pledged by the appellant. The internal memorandum dated 10 February 1996 can be seen at pp 1011–1016 of the appeal record at Bahagian 'C' at Jilid 7/15 and it was worded as follows:

"MEMORANDUM

DATE : 10TH FEBRUARY 1996

TO : THREE (3) MEMBERS OF CREDIT COMMITTEE 'A'

1. CHIEF EXECUTIVE OFFICER
CUM EXECUTIVE DIRECTOR

2. CHIEF GENERAL MANAGER
OPERATIONS

3. SENIOR GENERAL MANAGER
COMMERCIAL BANKING DIVISION 1

FROM : NPL MANAGEMENT
COMMERCIAL BANKING DIVISION 1

SUBJECT : BEKALAN SAINS P & C SDN. BHD. ('BORROWER') – NPL APPROVED CREDIT FACILITIES OF RM8.8 MILLION D AMANSARA UTAMA BRANCH

1. THE REQUEST

To restructure the outstanding trust receipt facility amounting (to) RM4.977 million into a term loan facility with a fixed monthly instalment of RM107,468.36 for a period of 5 years w.e.f. 1/1/97. Meanwhile, the borrower proposed to service the interest of RM15,000 a month w.e.f. 1/1/96. The actual interest amount is RM44,378.00 per month. Borrower has agreed for the bank to set-off any shortfall on the interest amount for 1996 against the fixed deposit sum pledged on lien to us on monthly basis.

2. BACKGROUND

2.1 The borrower was incorporated on 4/2/91 with capital as follows:-

Capital	Amount RM (mill)
Authorised	5.0
Paid-up	1.0

2.2 The borrower's main business activity is the supply of cattle and animal feed to government and private sectors. The cattle business is the major contributor to its sales. Most of the cattles are brought from Australia and India.

2.3 The bank has approved credit facilities to the borrower as follows:

	Approving Authority	Date of Approved	Amount Approved RM (mill)
i)	CCB'	10/483	0.8
ii)	CCB'	4/1183	0.8
iii)	CCA'	8/7/94	5.7
iv)	CCA'	10/389	1.5
		Total	8.8

2.4 The NPL or the trust receipt facility started in July 1995 when the company's

accounts have been manipulated by one of its accountant and the monies have been siphoned out by him. Presently, the borrower is proceeding with CBT charge against the accountant who has already left the company.

2.5 The bank issued several reminders to the borrower and the guarantors to settle the outstanding trust receipts facility failing which the bank shall proceed with legal actions against the guarantor and foreclosure proceeding on the charged properties.

2.6 The borrower had on 09/12/95 appealed to YAB Deputy Prime Minister to defer legal action against them and proposed to the bank to consider the restructuring proposal.

2.7 Based on the above, the Deputy Prime Minister's Department has requested the bank to look into the above matter.

3. PROPOSED NEW RESTRUCTURING

Type of Facility (RM'000)	Approved Limit (RM'000)	Balance Outstanding as at 31/1/96 (RM'000)	Proposed Restructure Limit (RM'000)	Remarks	Security Position (RM'000)
OD	2,500	2,422	2,500	Monthly servicing of interest.	i) Nota Security (MRM 1,453) FSM,170 FD pledged on end. TF – 503 OD – 250 = 753 Total 1,923
Type of Facility (RM'000)	Approved Limit (RM'000)	Balance Outstanding as at 31/1/96 (RM'000)	Proposed Restructure Limit (RM'000)	Remarks	Security Position (RM'000)
–	–	–	4,977	To be paid under monthly instalment of RM107,468.36 for a period of 5 years. The repayment is to commence one year after restructuring. Meanwhile the borrower is to service interest monthly.	ii) Debenture covering 1st ... floating charge on the co's. iii) Guaranteed by the directors as follows:- a. YB Suhaimi B. Ibrahim – State Assemblyman for Benta, Pahang and President of Majlis Belia Malaysia (MBM) b. Mej. Gen. (R) Dato Hj Fauzi B. Hussain

LC/TR/ BA	6,000	4,977	1,023	Principal and interest to be settled on due date.	a. Chandran A/L Karunakaran b. Zanah Bt. Abdul Hamid
BG	300	91	300	Principal and interest to be settled in the event the bank honour the claim.	
Total	8,800	7,490	8,800		1,923

4. COMMENTS

The borrower's restructuring proposal of the trust receipt facility into a term loan merits our consideration due to the following:-

4.1 The borrower is finalising an agreement with KHB Foodlink, a subsidiary of Kretam Holdings to supply 500,000 birds (matured chicken) a month. This contract can secure an annual sales turnover of RM32 million in 1997 and an average profit of RM1.2 million per year for a period of 5 years. In 1995, borrower made a loss of RM1.7 million against sales turnover of RM7.3 million.

4.2 The borrower recent business failure was a genuine one due to the internal fraud. The borrower has rectified the matter by filing CBT charges against the culprit.

4.3 At this juncture, if the bank proceed(s) with legal action and foreclosure, it will be time consuming and costly. The guarantors will protract the matter by filing a defence and this will further delay the matter.

4.4 Currently, the borrower is operating under its own generated funds and would require one year period to turnaround the company by sourcing contracts from other parties.

5. RECOMMENDATION

5.1 Based on the foregoing, we recommend to restructure the borrower's credit facilities as follows:-

	Type of Facility	Approved Limit	Balance Outstanding as at 31/1/96	Proposed Restructure Limit	Remarks
	(RM'000)	(RM'000)	(RM'000)	(RM'000)	
i.	OD	2,500	2,422	2,500	Monthly servicing of interest.
ii.	TL	--	--	4,977	To be paid under monthly instalment of RM 107,468.36 for a period of 5 years. The repayment is to

***BANK BUMIPUTRA MALAYSIA BERHAD**

Our Ref: UTAM/CBC/HA/FZ/fa
Date: 26th February, 1996

M/S Bekalan Sains P & C Sdn Bhd
No. 3, Jalan Mesra Satu
Taman Mesra
40510 Shah Alam
Selangor Darul Ehsan

Dear Sir

Re: RESTRUCTURING OF FACILITIES (TOTALLING) RM8.8 MILLION
A/A NO: OD/TL/LC/TR/BA/BG/96/26

With reference to the above, we are pleased to inform you that your request to restructure has been approved by our Bank subject to the following terms and conditions:

1.	FACILITY :	TYPE	(RESTRUCTURED) LIMIT (RM'000)
		Overdraft	2,500,000.00
		Term Loan	4,977,000.00
		LC/TR/BA	1,023,000.00
		BG	300,000.00
		TOTAL	8,800,000.00

2. PURPOSE : To restructure the outstanding Trust Receipt facility amounting (to) RM4,977 million into Term Loan facility with a fixed monthly instalment of RM107,468.36 for a period of 5 years w.e.f. 1/1/1997.

To service interest of RM44,378.00 per month w.e.f. 1/1/1996. The Bank will set-off any shortfall on the interest amount for 1996 against the fixed deposit sum pledge(d) on lien to us on monthly basis.

3.	DURATION :	TYPE OF FACILITY	DURATION
		Term Loan	For a period of 5 years.
		Overdraft	Subject to yearly review.
		LC/TR/BA	Subject to yearly review.

4. SECURITY : Existing security arrangement (1st legal charge on land and building and debenture) shall remain unchanged.

Supplementary facility agreement or such other documentation as may be advised by the solicitor shall be effected to reflect the terms and conditions of the facilities.

5. REPAYMENT : a) Term Loan

[36] Thus, upon the appellant's request, the respondent bank by its letter of 26 February 1996 offered to restructure the total loan and banking facilities to RM8.8m for the purpose of restructuring the outstanding TR facility amounting to RM4,977,000, on which the appellant had defaulted, into a term loan facility.

[37] The detailed particulars of the restructured facilities are as follows:

a)	Overdraft	RM2,500,000
b)	Term Loan	RM4,977,000
c)	LC/TR/BA	RM1,023,000
d)	BG	RM300,000
	RM8,800,000	

[38] The letter of offer dated 26 February 1996 from the respondent bank to the appellant evidencing the restructuring of the facilities amounting to RM8.8m can be seen at pp 1026–1034 of the appeal record, Bahagian 'C', at Jilid 7/15 and that letter of offer was worded in this way:

BANK BUMIPUTRA MALAYSIA BERHAD

Our Ref: UTAM/CBC/HA/FZ/fa
Date: 26th February, 1996

M/S Bekalan Sains P & C Sdn Bhd
No. 3, Jalan Mesra Satu
Taman Mesra
40510 Shah Alam
Selangor Darul Ehsan

Dear Sir

Re: RESTRUCTURING OF FACILITIES (TOTALLING) RM8.8 MILLION
A/A NO: OD/TL/LC/TR/BA/BG/96/26

With reference to the above, we are pleased to inform you that your request to restructure has been approved by our Bank subject to the following terms and conditions:

1.	FACILITY :	TYPE	(RESTRUCTURED) LIMIT (RM'000)
		Overdraft	2,500,000.00
		Term Loan	4,977,000.00
		LC/TR/BA	1,023,000.00
		BG	300,000.00
		TOTAL	8,800,000.00

2. PURPOSE : To restructure the outstanding Trust Receipt facility amounting (to) RM4,977 million into Term Loan facility with a fixed monthly instalment of RM107,468.36 for a period of 5 years w.e.f. 1/1/1997.

To service interest of RM44,378.00 per month w.e.f. 1/1/1996. The Bank will set-off any shortfall on the interest amount for 1996 against the fixed deposit sum pledge(d) on lien to us on monthly basis.

3.	DURATION :	TYPE OF FACILITY	DURATION
		Term Loan	For a period of 5 years.
		Overdraft	Subject to yearly review.
		LC/TR/BA	Subject to yearly review.

4. SECURITY : Existing security arrangement (1st legal charge on land and building and debenture) shall remain unchanged.

Supplementary facility agreement or such other documentation as may be advised by the solicitor shall be effected to reflect the terms and conditions of the facilities.

5. REPAYMENT : a) Term Loan

A

(i) To be repaid in 60 monthly instalments of RM107,468.36 per month inclusive of interest. The repayment is to commence one year after the loan has been restructured (i.e. w.e.f. 1/1/1997).

(ii) You have to service the interest of RM44,378.00 a month w.e.f. 1/1/1996 of which RM15,000.00 will be paid by you and any shortfall on the interest for 1996 shall be settled through upliftment of the fixed deposit pledged on lien to us.

B

b) Overdraft

Repayable on demand.

C

c) Letter of Guarantee

The liability will be discharged upon return of our original guarantee of beneficiary's written consent for cancellation.

6. INTEREST RATE :

D

a) OD/TL/TR

At 2.5% per annum above bank's BLR, on monthly rests basis.

b) LETTER OF CREDIT

i) LOCAL LETTER OF CREDIT (SIGHT)

E

At 2.5% per annum above bank's BLR (presently our BLR is 8.2% p.a.) from date of negotiation to the date of repayment or conversion into Trust Receipts / Banks Acceptance.

ii) FOREIGN LETTER OF CREDIT (SIGHT)

F

At the prevailing overdraft rate levied by our depository agent from date of negotiation to the date of receipt of notification of negotiation.

At 2.5% per annum above bank's BLR from the date of receipt of notification of negotiation to date of payment or conversion of the Trust Receipt.

c) i) USANCE LETTER OF CREDIT (FOREIGN & LOCAL)

G

At 2.5% per annum above our BLR from the date of negotiation to the date of payment or conversion into Trust Receipt.

ii) BILLS RECEIVABLE DRAWN UNDER SIGHT LETTER OF CREDIT

H

A penalty interest of 1.0% above the prescribed rate will be

I

charged if the bill is not settled or could not be converted into Trust Receipt within 21 days from the date of the memo of bills.

i) BILLS RECEIVABLE DRAWN UNDER USANCE LETTER OF CREDIT

A penalty interest of 1.0% above the prescribed rate will be charged from the date of maturity to the date of payment or conversion into Trust Receipt.

ii) TRUST RECEIPT

At 2.5% per annum above our BLR if the bills is not paid on maturity date, interest shall be charged of 1.0% per annum above the prescribed rate from date of maturity to date of payment.

7. CONDITION(S) PRECEDENT:

7.1 Upon acceptance of our Letter of Offer which has been duly signed by the authorised signatories of the company and the company's seal be given thereof.

7.2 Board of Director's resolution authorising acceptance of facility and giving of security duly executed by the company has been submitted.

7.3 Board of Director's resolution authorising the bank to uplift part of fixed deposits pledged on lien to settle partially the monthly interest for 1996.

7.4 Supplementary facility agreement duly executed by authorised signatories of the company, to be stamped and witnessed by our solicitor and submitted to us.

7.5 A fresh letter of guarantee duly executed by authorised signatories of the company, stamped and witnessed by our solicitor and submitted to us.

8. OTHER TERMS AND CONDITIONS:

All other terms and conditions as specified (in) our Letter(s) of Offer(s) dated 21st April, 1993, 16th November, 1993, 14th July, 1994 and 16th March, 1995 shall remain unchanged.

Thank you.

Yours faithfully
for BANK BUMIPUTRA MALAYSIA BERHAD
DAMANSARA UTAMA BRANCH

Sgd. Illegible
(HASSAN ALI)
Branch Manager

c.c 1. Senior General Manager
Commercial Banking Division 1

24th Floor, Head Office

2. Area Manager
Area Office Selangor

3. Head Zone A,
BBMB Commercial Banking Regional Center 1
Wisma Haicom, Glenmarie
Selangor

For and on behalf of

Sgd. Illegible
(Authorised Signatory (ies) & Company's Stamp)

BEKALAN SAINS
P & C SDN. BHD.
3, JLN. MESRA, 1
TMN. MESRA,
BT. TIGA, 40000
SHAH ALAM
TEL: 5691732

[39] The letter of offer dated 26 February 1996 was accepted by the appellant as shown at the last page of that letter of offer.

[40] The salient features of the letter of offer dated 26 February 1996 are as follows:

(a) it evidences an agreement between the appellant and the respondent bank on the restructuring of the credit facilities in the sum of RM8.8m afforded by the respondent bank to the appellant;

(b) the appellant had subscribed to the contents of the 26 February 1996 restructuring agreement by its acceptance of the terms as set out therein;

(c) the purpose of the 26 February 1996 letter of offer is expressed to be:

> To restructure the outstanding Trust Receipt facility amounting (to) RM4.977 million into Term Loan facility with a fixed monthly instalment of RM107,468.36 for a period of 5 years wef 1.1.1997.
>
> To service interest of RM44.378.00 per month wef 1.1.1996. The Bank will set-off any shortfall on the interest amount for 1996 against the fixed deposit sum pledge(d) on lien to us on monthly basis.

(d) the duration of the 26 February 1996 letter of offer is, 'Subject to yearly review';

(e) by virtue of item 4 of the 26 February 1996 letter of offer, the respondent bank held the following security:

(i) existing security arrangement (first legal charge on land and building and debenture) shall remain unchanged; and

(ii) supplementary facility agreement or such other documentation as may be advised by the solicitor shall be effected to reflect the terms and conditions of the facilities.

(f) the obligations of the appellant are spelt out in the 26 February 1996 letter of offer in this way:

(i) to service interest of RM44,378 per month wef 1 January 1996. The respondent bank will set-off any shortfall on the interest amount for 1996 against the fixed deposit sum pledged on lien to the respondent bank on monthly basis; and

(ii) to service the interest of RM44,378 a month wef 1 January 1996 of which RM15,000 will be paid by the appellant and any shortfall on the interest for 1996 shall be settled through upliftment of the fixed deposit pledged on lien to the respondent bank.

[41] There appears to be some inconsistency about the repayment terms as spelt out in the 26 February 1996 letter of offer with the contents of the letter from the respondent bank's legal department. That letter can be seen at pp 1094–1097 of the appeal record at Bahagian 'C' at Jilid 8/15 and that letter was signed by Michael W C Chin and dated 15 April 1996. At p 1095, the letter was worded as follows:

> Page 3 Section 1(i)(b)
>
> The clause that the Borrower is to service the interest of RM44,378.00 a month with effect from 1st January 1996 and that RM15,000.00 will be paid by the Borrower is in Section 5(a)(ii) of the Letter of Offer dated 26th February 1996, but we do not understand this – how can there be a term on the one hand saying that the Borrower has to service the interest at RM44,378.00 a month, and on the other and, another part saying that only RM15,000.00 needs to be paid? This seems inconsistent to us. Solicitors please check with branch to confirm this clause.

[42] Under cross-examination, Michael W C Chin was asked about the inconsistencies. This was what he said at p 202 of the appeal record at Bahagian 'B' at Jilid 1/3:

Q: Why was there inconsistencies?

A: It seems inconsistent. I would know for sure because I do not know the background of the loan. I was just asking our lawyers to check to confirm whether the terms are correct. On reading this again I think the reason why I said is because you have on one hand a credit term stating repayment of a certain amount for RM44,378.00 per month. But on the other hand another repayment term stating RM15,000.00. I am just saying the amount seems to be inconsistent. I am asking the lawyer to check and confirm with our business people.

[43] However, prior to the issuance of the legal opinion, the appellant had already relied on the letter of offer of 26 February 1996 in so far as the repayment terms are concerned. The appellant's board of directors' resolution resolved on 8 March 1996 as follows (see pp 1040–1041 of the appeal record, at Bahagian 'C' at Jilid 7/15):

"BEKALAN SAINS P & C SDN. BHD.
(Incorporated in Malaysia)

WE, THE DIRECTORS OF THE COMPANY BY VIRTUE OF THE AUTHORITY CONFERRED UPON US UNDER THE PROVISION OF ARTICLE 90 OF THE COMPANY'S ARTICLES OF ASSOCIATION:–

RESOLVE THAT:

1. The Company do hereby accept from BANK BUMIPUTRA MALAYSIA BERHAD, Damansara Utama, Petaling Jaya Branch, the following restructuring facilities subject to the terms and conditions as stipulated in the said Bank's Letter of Offer dated 26th February 1996: –

FACILITIES	RESTRUCTURED LIMIT (RM)
Overdraft	2,500,000—00
Term Loan	4,977,000—00
LC/TR/BA	1,023,000—00
BG	300,000—00
Total :	8,800,000—00

for the following purposes: –

To restructure the outstanding Trust Receipt facility amounting RM4,977 million into Term Loan facility with a fixed monthly instalment of RM107,468-36 for a period of 5 years w.e.f. 1/1/1997.

To service interest of RM44,378.00 per month w.e.f. 1/1/1996. Any shortfall on the interest amount for 1996 will be set-off against the fixed deposit sum pledge(d) on lien to the Bank on monthly basis.

2. The existing security arrangement (1st legal charge on land and building and debenture) shall remain unchanged.

3. Authority be and are hereby given to the aforesaid Bank to uplift part of the fixed deposits pledged on lien to settle partially the monthly interest for 1996.

4. Authorisation be and are hereby given to Mr. Chandran A/L Karunakaran and Encik Zulkifli bin A. Raman to accept the Letter of Offer and execute Supplementary facility agreement and all other(s) relevant in relation thereto, in the name and on behalf of the Company and THAT authorisation be hereby given for the affixation of the Common Seal of the Company onto the relevant documents, where necessary, in accordance to the Company's Articles of Association.

5. Mr. Chandran A/L Karunakaran and Encik Zulkifli bin A. Raman be and are hereby appointed as the authorised signatories to execute fresh letter of guarantee in favour of the aforesaid Bank.

6. All other terms and conditions as specified in the aforesaid Bank's Letter of Offer dated 21 April 1993, 16 November 1993, 14th July 1994 and 16 March 1995 shall remain unchanged.

Dated this 8th day of March 1996.

BOARD OF DIRECTORS

Sgd. Illegible
ZULKIFLI BIN A. RAMAN

Sgd. Illegible
MEJ. GEN.(B) DATO' HAJI FAUZI BIN HUSSAIN

Sgd. Illegible
SUHAIMI BIN IBRAHIM

Sgd. Illegible
RAPIAH BINTI ABDULLAH

KUALA LUMPUR
Ref: KS112353.CR/LH/lk/tll."

[44] What is clear from the repayment terms as set out in the 26 February 1996 letter of offer is that if there be any shortfall the payment is to be obtained by the respondent bank through the upliftment of the fixed deposit pledged to the respondent bank as lien. This, according to the appellant, is a very important term of the restructuring agreement as set out in the letter of offer dated 26 February 1996.

[45] Now, materials were placed before the learned High Court judge be it in the form of documents and the testimonies of witnesses to determine the issue of liability.

[46] The respondent bank's letter of offer dated 26 February 1996 is a very crucial letter. Every part of this letter has to be appreciated. The caption of the letter of offer dated 26 February 1996 reads as follows:

> Re: Restructuring of facilities totalling RM8.8 million A/A No: OD/TL/LC/TR/BA/BG/96/26.

[47] The caption makes reference to a restructured agreement. And the opening paragraph of the letter of offer talks of the approval by the respondent bank to the restructuring as requested by the appellant. It reads as follows:

> ..., we are pleased to inform you that your request to the restructure has been approved by our Bank subject to the following terms and conditions.

[48] Two germane observations must be made in regard to the letter of offer dated 26 February 1996. Firstly, the 1:1 basis term which the respondent bank now contends as a condition to the restructured agreement is not mentioned in the letter of offer dated 26 February 1996. Secondly, in approving the

restructure as requested by the appellant, the respondent bank has expressly committed itself to the duration of the restructured facility LC/TR/BA, namely, 'Subject to yearly review'.

[49] As alluded to earlier, the respondent bank's terms and conditions for the restructuring of the loan as spelt out in the letter of offer dated 26 February 1996 have been accepted by the appellant. Such an acceptance by the appellant is said to be in compliance with the 'condition(s) precedent' of the letter of offer dated 26 February 1996.

[50] The earlier offer letters listed in the letter of offer of 26 February 1996, namely:

(a) the letter of offer dated 21 April 1993 (see pp 445–451 of the appeal record at Bahagian 'C' at Jilid 2/15);

(b) the letter of offer dated 16 November 1993 (see pp 553–559 of the appeal record at Bahagian 'C' at Jilid 3/15);

(c) the letter of offer dated 14 July 1994 (see pp 652–660 of the appeal record at Bahagian 'C' at Jilid 4/15); and

(d) the letter of offer dated 16 March 1995 (see pp 844–847 of the appeal record at Bahagian 'C' at Jilid 5/15 extending to pp 848–885 of the appeal record at Bahagian 'C' at Jilid 6/15)

did not contain the 1:1 basis term as a term or as a condition. And this point was emphasised by the appellant.

[51] Thus, it can be surmised that the 1:1 basis term was something new and not within the contemplation of the appellant and the respondent bank as at 26 February 1996. This seems to be the stand of the appellant.

[52] Once the letter of offer dated 26 February 1996 had been accepted by the appellant, a concluded restructured agreement was entered between the parties — the respondent bank on the one side with the appellant on the other side.

[53] An agreement can be forged by an exchange of communication evincing an offer and acceptance of the essential terms and conditions of the agreement as set out in the communication so exchanged.

[54] A contract is defined as an agreement giving rise to obligations which are enforced or recognised by law. A crucial factor which distinguishes contractual from other legal obligations is simply this: that they are based entirely on the agreement between the contracting parties.

[55] A person is bound 'whatever a man's real intention may be', if 'a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him' (*Smith v Hughes* [1861–73] All ER Rep 632 at p 637; and *Cambridge Nutrition Limited v British Broadcasting Corp* [1990] 3 All ER 523 at p 542). A B

[56] An agreement is made when one party accepts an offer made by the other. The requirements are quite simple and straightforward. All it requires is that the agreement must be certain and final. C

[57] A contract is an agreement enforceable at law. The agreement between the parties must exhibit certain key characteristics. And if those characteristics are not present, the agreement is not a contract and the courts will not assist in its enforcement. The key characteristics are the essential elements of any contract and they may be stated as follows: D

(a) offer;

(b) acceptance;

(c) consideration; E

(d) intention to be bound;

(e) mutuality;

(f) capacity; and

(g) legality. F

[58] Thus, when there is an offer and an acceptance of that offer, an agreement is in existence and the court will enforce it. In simple contracts the agreement must be supported by consideration to establish the obligation. The parties too must intend the agreement to have legal force because the courts will only enforce what the parties intend should be enforced. The parties must also agree that their agreement must be mutual. And the parties must also be legally capable of reaching a binding agreement and, finally, the subject matter of their agreement must be legal. G H

[59] In deciding whether the parties have reached an agreement, the law looks for an offer by one party and an acceptance to the terms and conditions of that offer by the other. There would be a bargaining process leading up ultimately to an agreement or meeting of the minds. This is the traditional method of analysis of an offer and an acceptance which has been applied by the courts in determining the formation of the contracts. But for a contract to be formalised, all the terms and conditions must be fulfilled. The failure to fulfil a term or a condition would not give rise to a concluded contract. I

[60] According to the case of *Storer v Manchester City Council* [1974] 3 All ER 824; [1974] 1 WLR 1403 (CA), an offer is an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the offeree.

[61] Now, a perusal of the letter of offer dated 26 February 1996 particularly to items 7.2 – 7.5 show that they are conditions to regularise or formalise an agreement that had already crystallised containing the terms and conditions as offered by the respondent bank and to be accepted by the appellant.

[62] It is said that all the necessary elements of a concluded contract are set out in the letter of offer dated 26 February 1996, namely:

(a) the type of facility restructured;

(b) the purpose of the facility;

(c) the duration of the facility;

(d) the security to be provided;

(e) the repayment terms and the mode of such repayment; and

(f) the interest payment.

[63] It is emphasised that the letter of offer dated 26 February 1996 is a concluded restructuring agreement and it is an agreed fact in this appeal.

[64] Item 7.4 of the letter of offer dated 26 February 1996 makes reference to the execution of a supplementary facility agreement ('the SFA') by the authorised signatories of the company (referring to the appellant), to be stamped and witnessed by 'our solicitor' (referring to the respondent bank's solicitors) and submitted to the respondent bank.

[65] The SFA was prepared by the respondent bank's lawyers as evidenced by the name of the solicitors and their file reference number. The SFA makes reference to all the earlier agreements of 1993, 1994 and 1995. It is submitted that the 1:1 basis term is not part of the terms and conditions of the SFA. It is also submitted that it is reasonable to assume that the 1:1 basis term was not in the contemplation of either party otherwise the respondent bank would have included it in the SFA as a term also. It is submitted further that the appellant had executed the SFA by way of fixing the common seal of the appellant to it.

[66] The restructuring agreement of 26 February 1996 — at this juncture it is appropriate to label the letter of offer of 26 February 1996 as the restructured agreement, encapsulates all the earlier facility agreements of 1993, 1994 and

1995 and we categorically say that it is the loans that were given to the appellant pursuant to those agreements which were the subject matter of the restructured agreement.

[67] Of course, the appellant defaulted in making payments to those loans in 1993, 1994 and 1995. The respondent bank were at pains to indicate to us the defaults of the appellant in servicing those loans in 1993, 1994 and 1995. The appellant submits that such evidence of defaults is irrelevant bearing in mind the nature of the restructured agreement.

[68] Item 7.5 of the restructured agreement dated 26 February 1996 makes reference to the guarantee and indemnity executed by the directors of the appellant as seen at pp 1051–1066 of the appeal record at Bahagian 'C' at Jilid 8/15. It is pointed out that the signatures of the directors of the appellant as attested by the advocate and solicitor working for the respondent bank appears in that guarantee and indemnity.

[69] It is argued that it is reasonable to assume that the respondent bank's solicitors would not have gone to the extent of setting the guarantee and indemnity and even attended to the execution and attestation thereof if there was no concluded restructured agreement dated 26 February 1996.

[70] It is submitted that the guarantee and indemnity did not feature the 1:1 basis term.

[71] There is a letter dated 13 March 1996 from the respondent bank to Messrs Nordin Yusoff & Co — the respondent bank's solicitors. That letter can be seen at p 1068 of the appeal record at Bahagian 'C' at Jilid 8/15 and it was worded in this way:

[72] Now, the second paragraph of the said letter is self explanatory. It shows clearly that the terms of the restructured agreement are clearly spelt out in the same restructured agreement dated 26 February 1996.

"Re: RESTRUCTURING OF FACILITIES TOTALLING RM8.8 MILLION A/A NO: OD/TL/LC/TR/BA/BG/96/26
F'G BEKALAN SAINS P & C SDN BHD

We refer to the above matter and our customers letter dated 13th March, 1996.

Please prepare the necessary documents based on our Offer Letter dated 26th February, 1996.

Your immediate attention on this matter we greatly appreciated.

Thank you."

[73] It is submitted that the said letter too is silent as to the 1:1 basis term.

[74] At this juncture, it is opportune to refer to the respondent bank's letter addressed to the appellant dated 26 April 1996 which introduced the 1:1 basis term. This letter can be seen at p 1105 of the appeal record at Bahagian 'C' at Jilid 8/15 and it was worded in this way:

> "26th April, 1996
>
> Re: RESTRUCTURING OF FACILITIES TOTALLING RM8.8 MILLION A/A NO: OD/TL/LC/TR/BA/BG/96/26
>
> The above matter refers.
>
> Kindly be informed that our Head Office has decided the following:
>
> 1) Utilisation of the new restructured limit of the trade bills (LC/TR/BA) of RM1.023 million shall be on 1:1 basis.
> 2) You have to service the arrears of the monthly interest of RM15,000-00 a month w.e.f. 01/01/96.
>
> Thank you."

[75] The letter dated 26 April 1996 gave rise to the present proceedings before the High Court and before us. The caption of this letter makes reference to the very same facility referred to in the restructured agreement dated 26 February 1996.

[76] The second paragraph of the letter dated 26 April 1996 shows that the respondent bank's head office unilaterally decided to impose a fresh term on a substantial basis. It means, according to the appellant, that for every Ringgit accorded by the respondent bank to the appellant, the appellant has to put it a Ringgit. The respondent bank's witness ('DW2') — Mr Mohamad Ainuddin bin Mohd Nasurdin ('Ainuddin'), version of 1:1 was this (see p 204 of the appeal record at Bahagian B' at Jilid 1/3):

Q: What is the meaning of the 1:1 imposed?

A: If the TR is overdue (then) any further draw down of the LC must have a security backing and that is (what) 1:1 mean whatever amount is deposited the LC would be open in addition to what has been given as LC/TR facility under the 10% margined deposit basis.

[77] According to the respondent bank the imposition of the 1:1 simply means that there will be an increase in the marginal deposit to be placed before the opening of an LC to 100% of the value of the LC.

[78] And according to the respondent bank, under the terms of the original facilities, every time that the appellant wished to open a new LC using the credit facility given, the appellant had to deposit with the respondent bank a sum equivalent to 10% of the value of that new LC. So, according to the respondent bank, with the imposition of the 1:1 the appellant had to deposit RM100 with the respondent bank for every RM100 value of LC it required to be issued.

[79] Whatever meaning to be assigned to the 1:1 basis term, it is submitted that the respondent bank had purportedly attempted to do a complete volte-face without informing the appellant. It is said that what the respondent bank did was unbecoming of a reputable bank and we were urged not to countenance such an act from a financial institution.

[80] It must be borne in mind that the restructuring agreement of 26 February 1996 is exactly two months earlier than the letter dated 26 April 1996. It is submitted that the respondent bank sought to vary its own term as captured in the restructuring agreement of 26 February 1996 which expressly provides that the facility LC/TR/BA is 'subject to the yearly review'.

[81] The purported variation, obviously a unilateral one, is quite baffling. It does not reflect well on the respondent bank. There is a total disregard to the sanctity of the restructured agreement dated 26 February 1996. These were the submissions of the appellant and we took note of it.

[82] The appellant further argued along the following lines. That the letter from the respondent bank dated 26 April 1996 evinces a clear intention to depart from the express term as agreed by the parties in accordance with the restructured agreement dated 26 February 1996. That the appellant's board by way of the directors resolution had agreed to accept the restructured agreement dated 26 February 1996 and the directors resolution was a requirement stipulated in the restructured agreement dated 26 February 1996.

[83] It is argued that by the unilateral imposition of the 1:1 basis term the respondent bank has evinced an intention not to honour the restructured agreement dated 26 February 1996 and that, according to the appellant, constitutes a blatant breach of the restructured agreement.

[84] It is argued on behalf of the respondent bank that the appellant's case hinged on the restructured agreement dated 26 February 1996 and that whatever defaults that took place in 1995 were immaterial and that the imposition of the 1:1 is not applicable at all.

[85] It is the contention of the respondent bank that the appellant never complied with the essential conditions precedent as well as the fundamental terms of the restructured agreement dated 26 February 1996.

[86] The respondent bank argues that it is not sufficient for the appellant to argue that the restructured agreement dated 26 February 1996 was issued and that the appellant had accepted it. The respondent bank argues that the appellant had to comply with the terms of the restructured agreement dated 26 February 1996. It is the contention of the respondent bank that the appellant had never complied with the essential conditions precedent and the fundamental terms of the restructured agreement dated 26 February 1996.

[87] The respondent bank highlights the defaults of the appellant prior to the restructuring on 26 February 1996. According to the respondent bank, the purpose of the LC facility was to finance the appellant's imports of livestock. And that payment is made on the LC against shipping documents. Upon arrival of the livestock at Port Klang, the appellant would require the shipping documents to obtain the livestock. The respondent bank would release the shipping documents to the appellant against the TRs signed by the appellant. In his affidavit, Ainuddin (DW2) had this to say in response to a question (see p 280 of the appeal record at Bahagian 'B' at Jilid 2/3):

> 38. QWhat is the relationship between a Letter of Credit and a Trust Receipt?
>
> A: A Letter of Credit is a document issued by the Bank undertaking payment to the Plaintiff's supplier against delivery of documents showing the shipment of goods. When the goods arrive in Malaysia, the Plaintiff needs these shipping documents to obtain the goods from Customs and the Port Authorities. The Defendant will release the shipping documents upon the Plaintiff signing Trust Receipts. "

[88] Clause 1 of the TR as seen at p 1418 of the appeal record at Bahagian 'C' at Jilid 11/15 stipulates as follows:

> (1) to land store hold and deliver to purchasers the said goods and receive their proceeds as Trustee(s) for you and as Agent(s) on your behalf and not otherwise and in the event of the said goods or any portion thereof being sold and cleared before full and and complete payment of the said draft or drafts. I/We Pledge myself/ourselves that the proceeds of such sales shall be received and retained by me/us as Trustee(s) for you and that they shall be kept separate and apart from my/our other monies, and to pay to you the proceeds of such sales as soon as the goods are released as and when received by me/us, in order that the same may be applied in or towards payment of the goods. I/We at the same time furnishing to you all necessary particulars to enable you to apply the same to the relative draft in each case.

[89] And the duration of the TR is for a period of 120 days (see p 1418 of the appeal record at Bahagian 'C' at Jilid 11/15). A

[90] The respondent bank drives home the point that shortly after the 16 March 1995 additional facilities were given, the appellant defaulted in repayment of the TRs. The account was then classified in August 1995 as an NPL loan. The appellant then requested the respondent bank to issue further LCs. The respondent bank would only agree to issue further LCs on a 1:1 basis. B

[91] In the statement of defence, the respondent bank avers that it is entitled to vary the terms of the agreement at any time. But according to the decision of the Supreme Court in Paul Murugesu s/o Ponnusamy (as representative of *Nalamah d/o Sangapillay (deceased) v Cheok Toh Gong & Ors* [1996] 1 MLJ 843 that mere knowledge of a variation is insufficient. In the words of Peh Swee Chin FCJ who delivered the judgment of the Supreme Court at p 854: C D

> It is to be borne in mind also that mere knowledge of a variation is not consent of a variation: see *Coronation Electronics Ltd v Lalchand Mahtani* [1987] 1 MLJ 190 at p 197 per Chan Sek Keong JC (as he then was).
>
> Thus, in *Cowey v Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45, which can throw light on the nature of evidence required to prove consent to a variation of a term of agreement, the court held there that it was not competent for a party to a contract to vary the terms of the contract just by passing out a circular or notice unilaterally to the other party. E

[92] It is argued that the conduct of the respondent bank in unilaterally imposing changes to the terms of the restructured agreement dated 26 February 1996 constitutes a breach of 'an elementary obligation' on the part of the respondent bank with the appellant as the customer. In the words of PS Gill FCJ delivering the judgment of the Federal Court in *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1, at pp 11 and 12: F G

> (24) It is our considered view, that there was an elementary obligation on the part of the first respondent, as bankers to inform the fifth appellant as customers of theirs, of the substantial change that they had inserted in the facility agreement. The bank had in this case, executed the facility agreement by shutting its eyes to the obvious fact that they had varied the facility agreement, without the consent of the fifth appellant. It was not in issue that DW1 relied upon and trusted PW2 at the material time. There was also no evidence adduced that PW2 had advised DW1 to seek for independent advice prior to the execution of the facility agreement. It should also be remembered that the 'relationship of banker and customer may be said to begin the moment the parties enter into relationships or negotiations which are considered part of the contract, ultimately concluded. The negotiations must be part of the process and lead directly to agreement; negotiations without agreement cannot establish the relationship' (see *Paget's* H I

Law of Banking, 9th Ed). In the present appeal, it was not in dispute that indeed prior to the execution of the facility agreement there was negotiation as evidenced by the working draft and which terms were supposed to be incorporated into the facility agreement. Hence, even before the execution of the facility agreement there was already a relationship formed between the parties. In such a situation, it was therefore de rigueur for PW2 to inform DW1 on the variations made or the departure from the agreed terms in the working draft. Thus, the failure to do so in our view amounts to a fundamental breach of duty of care on the part of PW2 and vicariously the first respondent.

(25) We also find it intriguing why, after having negotiated with the fifth appellant over a considerable period of time and finally agreeing to a working draft, that the respondent would do a complete volte-face, without informing the fifth appellant. Was it done in the pious hope that the fifth appellant may not stumble upon it in the agreement? In this instance, the fifth appellant did just that. If this is the case, then it is conduct that we do not propose to countenance from a financial institution.

[93] A customer of the bank is a person who has a more permanent relationship with the bank, for instance, having an existing account with the bank (*The Great Western Railway Company v The London and County Banking Company, Limited* [1901] AC 414 (HL); *Commissioners of Taxation v English, Scottish and Australian Bank, Limited* [1920] AC 683 (PC); *Ladbroke And Co v Todd* (1914) 30 TLR 433; *The Rubber Industry (Replanting) Board v Hongkong and Shanghai Banking Corporation* [1957] MLJ 103) or entering into an agreement with the bank in order to open an account (*Woods v Martins Bank Limited And Another* [1958] 3 All ER 166; [1959] 1 QB 55) or obtaining an overdraft, a letter of credit/trust receipt and banker's guarantee like the present appeal before us.

[94] It goes without saying that once there is in existence a banker customer relationship, the rights and obligations between the parties would come into existence. A banker owes a duty to the customer to maintain confidentiality and to exercise a duty of care in carrying out the instructions of the customer.

[95] In *The Great Western Railway Company v The London and County Banking Company, Limited*, the House of Lords held that the presence of an account with the bank was an important factor to be taken into consideration in order to determine whether a person was a customer of the bank.

[96] In *Importers Company, Limited v Westminster Bank, Limited* [1927] 2 KB 297 (CA), Bankes LJ explained the meaning of the word 'customer' in this way (see p 305):

> What does the expression 'customer of a bank' cover? The most ordinary meaning, I suppose, is 'a person who keeps an account at the bank.' Such a person is obviously a customer. But banks do various kinds of business, and in all those the individuals or the companies with whom they do the business may properly be called customers; and they can properly be so called, whether they are individuals or whether they are banks. In this case this class of business of collecting cheques was done between bank and bank, and it seems to me impossible to contend, as a matter of law, that the bank for which the respondents were doing the business were not, in reference to that business, their customer.

[97] Now, what is the relationship between a banker and his customer? According to the House of Lords in *Edward Thomas Foley v Thomas Hill and Others* (1848) 2 HL Cas 28, the banker and customer relationship was essentially of debtor and creditor. In holding that the relationship of the banker and customer was one of debtor and creditor and not that of trusteeship, Lord Brougham had this to say at p 44 of the report:

> This trade of a banker is to receive money, and to use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to the customer, I cannot, without breaking down the bounds between equity and law, — without, as it were, removing the land-marks of jurisprudence, — I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character.

[98] The law relating to banking rotates on the interplay of forces governing the relationship between a banker and a customer. In *Ladbroke And Co v Todd*, it was held, inter alia, that 'the relation of banker and customer begins as soon as the first cheque is paid in and accepted for collection and not merely when it is paid'. Similarly, in *Commissioners of Taxation v English, Scottish and Australian Bank, Limited* at p 687, it was held that the word 'customer' signifies a relationship in which duration is not of the essence. Thus, habit or continued dealings will not make a party a customer unless there is an account in his name.

[99] Even though the business of banking had been firmly established before the end of the seventeenth century, there is no reported case law on the exact status of the relationship. Perhaps *Carr v Carr* (1811) 1 Mer 625 was the earliest case that considered the relationship between a banker and a customer. That was a case where a testator made a bequest of 'whatever debts might be due to (him) … at the time of his death'. And the issue that fell to be determined was whether 'a cash balance due to him on his banker's account passed by his bequest'. The court held that it did. The court also held at p 543 that the 'money paid in, generally, to a banker could not be so considered. He

observed, that money had no ear-mark; that, when money is paid into a banker's, he always opens a debtor and creditor account with the payor. The banker employs the money himself, and is liable merely to answer the drafts of his customer to that amount'.

[100] In the same vein, in the case of *William Devaynes and Louisa his Wife, and Thomas Monsell (an Infant) v WM Noble, Sam Pepys Cockerell, Fred Booth, Mary Devaynes, Elizabeth Smith, Lestock Wilson, John Morris, and Joseph Down; Sir Thomas Baring, Bart, and Sir Frank Standish, Bart (on behalf of themselves, and all other the Creditors of the partnership of William Devaynes, John Dawes, William Noble, Richard Henry Croft, and Richard Barwick, who shall come in and contribute, & e) v The said William Noble, Samuel Pepys Cockerell, Frederick Booth, Lestock Wilson, John Morris, Joseph Dorien, WM Devaynes, and Louisa his Wife, Mary Devaynes, Elizabeth Smith, and Thomas Monsell* (1816) 1 Mer 529, the court held that 'money paid into a bank becomes immediately a part of his general assets; and he is merely a debtor for the amount'.

[101] It is quite surprising that the word 'customer' is not defined in our Banking and Financial Institutions Act 1989 ('BAFIA'). However, all is not lost. From a long line of authorities it is quite clear that maintenance of some sort of account with the bank is the primary factor in the determination of who is a customer.

[102] A person becomes a customer and a contract is created when an account is opened (*Commissioners of Taxation v English, Scottish and Australian Bank, Limited*; and *Woods v Martins Bank Limited And Another*).

[103] Even though the BAFIA does not define the word 'customer', it defines the word 'depositor' as 'a person entitled to repayment of a deposit, whether made by him or any other person'. It is clear that the word 'depositor' has a narrower meaning than the word 'customer'. What it means is this. That all depositors are customers. But not all customers are depositors.

[104] The Court of Appeal in *Robinson v Midland Bank, Limited* (1925) 41 TLR 402 had to deal with a person who purported to be a customer of the bank and who sought to make the bank liable for funds passing through the account which did not belong to him. The court held that the bank was not liable and that the word:

> ... 'customer' is probably impossible to define with exactness but the chief criterion is that there exists an account with a bank through which transactions are passed. A course of dealing not distinctly related to banking business is not sufficient to create the relation of banker and customer.

[105] At this juncture, it is ideal to examine the definition of the word 'bank'. Section 2(1) of the BAFIA defines the word 'bank' as 'a person which carries on banking business' and it proceeds to define 'banking business' as:

(a) the business of

(i) receiving deposits on current account, deposit account, savings account or other similar account;

(ii) paying or collecting cheques drawn by or paid in by customers; and

(iii) provision of finance; or

(b) such other business as the Bank, with the approval of the Minister, may prescribe.

[106] Our Bills of Exchange Act 1949 (Act 204) defines 'banker' as including 'a body of persons, whether incorporated or not, who carry on the business of banking'. But this Act does not provide any definition for the expression 'business of banking'.

[107] The following characteristics of the business of banking are set out in the landmark case of *United Dominions Trust, Limited v Kirkwood* [1966] 1 All ER 968; [1966] 2 QB 431, (CA):

(a) the conduct of current accounts;

(b) the payment of cheques drawn on bankers; and

(c) the collection of cheques for customers.

[108] The phrase 'carrying on banking business' featured prominently in the case of *Bank of China v Lee Kee Pin* [1961] MLJ 40. In that case, the Bank of China which had been operating in Malaysia was subsequently refused a licence to transact banking business. It sought to recover debts due to it. The defence of the defendant was that the Bank of China was operating a banking business contrary to s 3 of the Banking Ordinance 1958 because it no longer had a licence to transact banking business. It was held that a bank operating in Malaysia but which was subsequently refused a licence could still recover debts due to it as proceedings to recover debts did not amount to carrying on banking business contrary to s 3 of the Banking Ordinance 1958.

[109] In *Koh Kim Chai v Asia Commercial Banking Corporation Limited* [1981] 1 MLJ 196 (FC); [1984] 1 MLJ 322 (PC), it was held that when a foreign bank acquired and accepted charges of land in Malaysia, it could not be said that that foreign bank was conducting banking business in Malaysia.

[110] Be that as it may, the following germane observations must be made. Today, the services rendered by banks are no longer confined to the traditional mundane activities of opening savings account, honouring checks and granting housing or car loans. It has gone to new heights: credit and charge cards are issued, diverse foreign exchange dealings are undertaken, telegraphic and electronic transfers of moneys are done by the hour, internet monetary transactions in huge amounts are conducted on a routine basis, trade finance facilities are transacted daily, share financing and money market transactions are conducted by the hour. Indeed a host of other banking and investment services are rendered to the customers. The present appeal is a classic example of what a bank can provide its customers. So it is now quite difficult to define the word 'banker' or the word 'bank'. Times are moving ahead and there is no turning back.

[111] It takes two to create a relationship. Thus, the relationship of a banker and a customer will only come into existence if both parties intend it to be so (*Robinson v Midland Bank, Limited* and *The Great Western Railway Company v The London and County Banking Company, Limited*).

[112] The banker's rights are manifold. They are entitled to secure commissions and to levy service charges. The right to an interest and the right to set-off are also accorded to them.

[113] The customers' rights are extended to the drawing of cheques, to secure interest as well as to obtain repayment from the bankers. It is an implied term that the banker makes a promise to repay the customer 'a sum equivalent to that paid into his hands' (*Edward Thomas Foley v Thomas Hill and Others*).

[114] The mandate of a customer is of paramount importance to the banker. It is the duty of a banker to exercise care in carrying out a customer's instruction. Saville J aptly said in *Redmond v Allied Irish Banks Plc* (1987) FLR 307, at p 310:

> There is clear authority for the proposition that a bank owes its customer a duty to take reasonable care and skill in interpreting, ascertaining and acting in accordance with the instructions of his customer.

[115] Perhaps the relationship between a bank and its customer is best summed up by Lord Woolf CJ in the case of *Governor and Company of the Bank of Scotland v A Ltd and others* [2001] 1 WLR 751, at pp 760 – 761:

> These submissions call for some explanation since on the face of it the relationship between a bank and its customer is not a fiduciary relationship. It is a commercial relationship founded in contract into which the intrusion of equitable doctrines such as constructive notice may result, in the well-known words of Lindley LJ in

> *Manchester Trust v Furness* (1895) 2 QB 539, 545 , in 'doing infinite mischief and paralysing the trade of the country'.... Nevertheless, it is clear that a bank may become subject in equity to an accessory liability if it dishonestly assists in a breach of trust committed either by its customer or by others. When a bank account is in credit the bank's relationship to the customer is that of debtor, not trustee (*Foley v Hill* (1848) 2 HL Cas 28). But if the debt owed to the customer is affected by any equitable interest or claim of a third party the bank may become accountable in equity if it dishonestly assists in any course of action which disregards the third party's interest or claim.

[116] While Lindley LJ in *Manchester Trust v Furness* (1895) 2 QB 539 (CA), expressed the view that the courts were reluctant to extend the doctrine of constructive trust to commercial transactions. At p 545, this was what His Lordship said:

> There is no doctrine that goes to anything like that extent; and as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country.

[117] Vinelott J in *Eagle Trust Plc v SBC Securities Ltd* [1991] BCLC 438, at p 459, aptly said:

> The courts have been particularly reluctant to extend the doctrine of constructive notice to cases where moneys are paid in the ordinary course of business to the defendant in discharge of a liability.

[118] But when a bank unwittingly become involved in the fraudulent transactions of its customers, equity may impose certain liabilities on the bank and that would be that of constructive trusteeship. Thus, if a bank receives for its own benefit certain funds with knowledge that the funds were obtained by way of a breach of trust, the bank will become accountable to the owner of the funds as a constructive trustee (*El Ajou v Dollar Land Holdings plc and another* [1994] 2 All ER 685 (CA) at p 700, per Hoffmann LJ).

[119] Reverting to the mainstream, with these banking principles in mind, we were urged to dismiss the appellant's appeal and to affirm the decision of the learned High Court judge.

[120] It is argued that if this court were to accept that the conditions precedent to the restructured agreement dated 26 Februry 1996 have been complied with and that it constitutes a binding contract, the respondent bank submits that nevertheless the appellant would have breached its terms thereby entitling the respondent bank to impose the 1:1 condition. It is emphasised that the appellant breached its obligations to pay the monthly sum of RM15,000 towards servicing the interest. Such a default would certainly run counter to the terms of the restructured agreement dated 26 February 1996.

[121] It must be recalled to mind that under the terms of the previous loans, the respondent bank was entitled by written notice to amend the existing loans and conditions and impose additional conditions. It must also be recalled to mind that the obligations of the respondent bank to continue to provide the facilities were subject to no event occurring that would render the banking facilities immediately payable and no default by the appellant of any of the agreements. It is also ideal to recall to mind that the whole facilities would immediately become due and payable if the appellant were to commit any of the list of defaults which would include the failure to pay any sums on the due date, whether of interest or principal.

[122] In short, the respondent bank was entitled to recall the entire facilities including the restructured agreement bearing in mind that according to item 8 of the restructured agreement the 'other terms and conditions specified in the facilities of 21 April 1993, 16 November 1993, 14 July 1994 and 16 March 1995 shall remain unchanged'. The respondent bank was also entitled to suspend further credit. But, instead of recalling all the facilities, which the respondent bank was entitled to do so, an imposition of the 1:1 condition was levied.

[123] It is an acknowledged fact that the appellant did not pay the RM15,000 a month as interest. The affidavit of Ainuddin (DW2) at pp 298–299 of the appeal record at Bahagian 'B' at Jilid 2/3 should be referred to particularly to questions 78 and 79 and the answers thereto:

78. Q: What was discussed at this meeting?

A: At this meeting, the Plaintiff requested that it be allowed to issue an LC from the balance unutilised LC/TR facilities.

79. Q: Did the Defendant agree to this request of the Plaintiff?

A : The Defendant did not agree as there were overdue TRs. Further, the Plaintiff had not complied with the requirements of the Letter of Offer dated 26.02.1996, in that they had not paid the monthly interest instalment of RM15,000 per month from January 1996 onwards, nor had the duly signed and stamped guarantees and supplementary facilities agreement been furnished. In effect, the Plaintiff was in the same position they were in prior to the issuance of

the Letter of Offer dated 26.02.1996. In such a situation, the Defendant could only allow the Plaintiff to utilise the unused balance LC/TR facilities on a 1:1 basis, as per the bank's letter of 13.9.05 at p. 560 Bundle A3.

[124] It is also understood by all parties that the appellant was to pay RM15,000 a month towards the interest as a condition of the restructuring. This is clear from a reading of item 5(ii) of the restructured agreement dated 26 February 1996 and the appellant is thereby estoppel from contending that the said item 5(ii) has different meaning. On this point, in a similar light, Mr Justice Kerr in *Partenreederei M S Karen Oltmann v Scarsdale Shipping Co Ltd (The 'Karen Oltmann')* [1976] 2 Lloyd's Rep 708 at p 712 had this to say:

I think that in such cases the principle can be stated as follows. If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract would not result from any mistake. The words used in the contract would ex hypothesi reflect the meaning which both parties intended.

[125] In *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi Ahmad & Ors* [2005] 2 MLJ 32; [2005] 1 CLJ 416 (CA), Gopal Sri Ram JCA (later FCJ) had this to say at p 35 (MLJ) pp 419–420 of the report:

We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Tools v Schuler AG* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. See, *American Surety Co of New York v Calgary Mining Co Limited* (1919) 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Limited (In liquidation) v Texas Commerce Bank* [1982] QB 84; *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283.

[126] Lord Denning MR writing a separate judgment for the Court of Appeal in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 (CA), said at pp 582 – 583:

Subsequent conduct

A For many years I thought that when the meaning of a contract was uncertain you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough. The parties themselves should know what they meant by their words better than anyone else. In this I was supported by *Watcham v Attorney General of East African Protectorate* [1919] AC 533; [1918–19] All ER Rep 455, a B Privy Council case which was applied repeatedly in my early days in the common law courts. But it was always repudiated by the more logical minds in Chancery. Eventually the logicians prevailed. In *James Miller (James) and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 at p 798; [1970] AC 583 at p 603 Lord Reid said:

C ... it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

D I can understand the logic of it when the construction is clear; but not when it is unclear. Still, we must accept it. Nevertheless a way of escape was left open by *Viscount Dilhorne in that very case when he said (* [1970] 1 All ER 796 at p 805; [1970] AC 583 at p 611): '... subsequent conduct by one party may give rise to an estoppel.'

E So here we have available to us, in point of practice if not in law, evidence of subsequent conduct to come to our aid. It is available, not so as to construe the contract, but to see how they themselves acted on it. Under the guise of estoppel we can prevent either party from going back on the interpretation they themselves gave to it.

F

[127] Continuing at pp 583–584 of the same report, Lord Denning MR had this to say:

Course of dealing

G Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise be incomplete: see *Brogden v Metropolitan Railway* (1877) 2 App Cas 666 at p 682 per H Lord Hatherley. It may be used so as to introduce terms and conditions into a contract which would not otherwise be there: see *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121; [1956] 1 WLR 461 and *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1966] 1 All ER 309 at pp 322; [1966] 1 WLR 287, CA at pp 308 316; [1968] 2 All ER 444 at pp 462, 474–475, 481; [1969] 2 AC 31 at pp 90, 104, I 113; (per Lord Morris, Lord Guest and Lord Pearce in the House of Lords all disapproving the dictum of Lord Devlin in *McCutcheon v David Macbrayne Ltd* [1964] 1 All ER 430 at p 437; [1964] 1 WLR 125 at p 134) and *Hollier v Rambler Motors Ltd* [1972] 1 All ER 399 at pp 403–404; [1972] 2 QB 71 at pp 77–78 per Salmon LJ. If it can be used to introduce terms which were not already there, it must also be available to add to, or vary, terms which are there already, or to interpret

them. If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

To use the phrase of Latham CJ and Dixon J in the *Australian High Court in Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppel. They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to dealings which have taken place between the parties. That is the principle on which we acted in *Crabb v Arun District Council* [1975] 3 All ER 865; [1976] Ch 179. It is particularly appropriate here where the judges differ as to what is the correct interpretation of the terms of the guarantee. The trial judge interpreted it one way. We interpret it in another way. It is only fair and just that the difference should be solved by the course of dealing, by the interpretation which the parties themselves put on it and on which they have conducted their affairs for years.

So I come to this conclusion: when the parties to a contract are both under a common mistake as to the meaning or effect of it and thereafter embark on a course of dealing on the footing of that mistake, thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them.

[128] In *MBf Finance Berhad v Low Ping Ming* [2005] 3 MLJ 208; [2005] 1 CLJ 305, CA, Augustine Paul JCA (later FCJ) at pp 313 to 314 had this to say:

Both parties were fully aware that the initial payment had been made by the respondents to Avian before the execution of the agreement. It has been recognised in the Schedule to the agreement as having been paid. Clearly the parties had acted on the agreed assumption that payment to Avian would suffice for the purpose of cl 2. It would be unjust to allow the respondents to go back on the assumption pursuant to the operation of what is called estoppel by convention. Such an estoppel arose in *Amalgamated Investment & Property Co Limited v Texas Commerce International Bank Ltd* [1981] 3 All ER 577; a case cited with approval by Gopal Sri Ram JCA in writing for the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

[129] The factual matrix forming the background of the transaction is not to be confined to the restructured agreement dated 26 February 1996 but must

extend to other documents and circumstances pertaining to the transactions between the appellant and the respondent bank. We were in the course of the submissions regaled with documents in an attempt to show relevance by both sides.

[130] We remind ourselves that we are here to interpret the documents that have been tendered by the parties. It is the factual matrix forming the background of these documents that are relevant. In this context, we reiterate the need for an objective test in the construction of commercial documents. We need to refer to the speech of Lord Clyde in *Bank of Credit and Commerce International SA v Munawar Ali and others* [2001] 2 WLR 735 (HL). There His Lordship said at p 762:

> The knowledge reasonably available to them must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[131] The appellant's letter dated 16 April 1996 addressed to the respondent bank as seen at pp 1100 to 1102 of the appeal record at Bahagian 'C' at Jilid 8/15 shows clearly that at all material times, the appellant was fully aware of its obligations to pay RM15,000 a month. We have anxiously read this letter and we found that the appellant admitted that it was in arrears in paying the RM15,000 a month and the appellant asked for time to make payment. Paragraph 9 of the appellant's letter dated 16 April 1996 at p 1102 of the appeal record at Bahagian 'C' at Jilid 8/15 makes it abundantly clear:

> 9. On the issue of outstanding instalment for the restructured overdue LC/TR of RM15,000 a month for January to March, 1996, we will make good the arrears latest by 10th May, 1996. As mentioned to you, for the last three months we have made sure that the interest on the overdraft was serviced on time. We spent about RM22,000 a month in order to service the overdraft interest.

[132] Since it is an admission adverse to the appellant, it is admissible as an exception to the hearsay evidence rule under s 17 of the Evidence Act 1950 (Act 56). It is the best piece of evidence that is available.

[133] Mr Chandran a/l Karunathan ('Chandran') — PW2, suggested that RM15,000 a month was to be deducted from the overdraft facilities. A

[134] Now, by letter dated 1 April 1996, the appellant notified the respondent bank that it needed to drawdown the facilities on an urgent basis (see p 1087 of the appeal record at Bahagian 'C' at Jilid 8/15). Another meeting was held on 8 April 1996 and at this meeting the appellant repeated its request for the issuance of new LCs. What the appellant was contending was this. That in order to avail itself of the benefits of the offer dated 26 February 1996 which crystallised as the restructured agreement, and in particular to drawdown further facilities, the appellant thought that it had only to accept the offer by passing a directors' resolution. B C

[135] The appellant has completely misunderstood the offer dated 26 February 1996. We say that before the restructuring envisaged in the offer came into effect and before the appellant could make further drawdowns and avail itself of the benefits of the offer, the appellant must first comply with the requirements of the offer. The appellant must submit to the respondent bank the duly executed and stamped fresh guarantee and the SFA and pay the RM15,000 with effect from January 1996. D E

[136] As at 8 April 1996, the appellant failed to pay RM15,000 and the terms of the fresh guarantee and the SFA were not finalised yet. That being the case, the appellant issued its letter dated 26 April 1996 requiring the appellant to pay the arrears of RM15,000 and insisting that any drawdowns would be on a 1:1 basis. F

[137] To a question as to why the respondent bank imposed the 1:1 requirement, Ainuddin (DW2) had this to say in his own affidavit at pp 299 – 300 of the appeal record at Bahagian 'B' at Jilid 2/3: G

79A. Q: Why did the Bank impose a 1:1 requirement for the LC/TR/BA facility?

A : As I said above, we had informed the Plaintiff on 11.10.1995 that the Bank did not allow new Letters of Credit to be issued when a customer was in default on the Trust Receipts (see paragraph 3 at p 589, Bundle A3). We had agreed to restructure the facilities subject to the Plaintiff complying with the terms and conditions. However, as is clear from paragraph 9 at p 719, Bundle A4, the Plaintiff had not serviced the interest. It is also clear from my letter at pp. 737–738, Bundle A4, that the necessary loan documents were not submitted to the Bank even as late as 20.07.1996. I would further point out that before the Bank's letter of 26.04.1996 was issued, the Plaintiff's guarantors had already withdrawn their guarantees (see for example p 715, Bundle A4). The trust receipts, therefore were still a non-performing loan and the Bank could not be expected to issue new Letters of Credit without sufficient security. H I

[138] We will now examine the evidence of the witnesses. We begin with the evidence of Chandran (PW2).

[139] In regard to the poultry venture, Chandran (PW2) had this to say:

(a) That a contract had been signed between a Kretam subsidiary and the appellant. But when challenged by learned counsel for the respondent bank, he could not produce the contract.

(b) He claimed that the Kretam contract had been forwarded to the appellant. But this assertion contradicts the final sentence of the appellant's own letter of 29 September 1995 to the respondent bank as seen at p 958 of the appeal record at Bahagian 'C' at Jilid 7/15 which stated that the appellant would send 'a copy' of the agreement to the respondent bank once it was signed. That letter dated 29 September 1995 was worded in this way:

> Re: Repayment of Overdue Trust Receipts
>
> We wish to advise that the proposed payment of RM700,000 for the month of September 1995 towards partial settlement of overdue Trust Receipts have been hampered by lack of sales turnover due to unavailability of livestock beef cattles. However, we have paid RM150,000 to fulfill our commitment, although not near enough of the required amount. We have expressed our concern towards fulfilling our commitment to settle the overdue Trust Receipts if we fail to bring in a consignment of beef cattles. It appears our concern towards complying (with) this commitment has come true and we are working out other alternatives to continue our business activities.
>
> We are currently in the midst of negotiation with Kretam Holdings Berhad, who is setting up a poultry processing plant in the State of Johor, to supply 1.5 million birds a month that will generate a sales turnover of RM90 million a year. When the negotiation is finalised a Memorandum of Understanding will be signed to fortify the contract. This deal will provide us the impetus to inject fresh fund into the Company by way of investment or obtaining a term loan through the government's fund for the food industry.
>
> We very much appreciate if you could give us some time to consolidate our position, as it is vital for the conclusion of the deal that we are currently working out. When the MOU is signed with Kretam Holdings Berhad we shall forward a copy to your office.

(c) Of significance is this. That he did not explain as to why the existence of this contract was not disclosed in either Jadual 1 or Jadual 2 of his own affidavit of documents filed at the discovery stage. Granted that the existence of the contract had been overlooked at the discovery stage, he could but he did not file a further affidavit to explain the situation.

(d) Again, of significance to note is this. That there was no reference to the existence of the contract in the notice to produce served on the respondent bank.

(e) It is crystal clear that the Kretam contract had not been signed and it was still in the negotiation stage. The contemporaneous correspondence points to this fact. And the fact that he was prepared to lie about such an important matter shows that his evidence is entirely self-serving.

(f) He even denied that the appellant had intended to set up a poultry farm to supply chickens if it was given the Kretam contract. He stuck to his denial even when he was shown the minutes of the meeting that showed the contrary. He then admitted that the appellant intended to set up a poultry farm but claimed that it was just a standby for back up. But when the same question was put to him again, this time he admitted that the intended purpose of the poultry farm had been to supply chickens to Kretam.

[140] In regard to the cattle contract, Chandran (PW2) had this to say:

(a) He insisted that the price of cattle had been fixed. But this contradicted the evidence of Mr Halleen Richard John Wayne ('Halleen') ('PW1') and the documents. He called Halleen (PW1) who had 17 years in the livestock export business. Halleen's (PW1's) evidence on the cost of cattle would have been useful to the court. But Halleen (PW1) could not remember the price of cattle for April 1976 and for the next five years which is the period of the claim by the appellant. Halleen (PW1) could only remember that the price substantially increased in 1997. Halleen (PW1) testified that the price of cattle was not fixed but was negotiated for each assignment. Halleen (PW1) also testified that the appellant was a 'preferred customer', but Halleen (PW1) could not explain in monetary terms the difference between market price and the price given to a 'preferred customer'. This piece of evidence from Halleen (PW1) must be viewed against the earlier complaint by the appellant that they had been 'trapped' by the same supplier into paying a high price. The contract with the supplier confirmed Halleen's (PW1's) evidence that there was no fixed price for the cattle and that the price would be negotiated at each shipment.

(b) Chandran (PW2) testified that in September 1995 the appellant had negotiated a fixed discounted price from their supplier. But this is not supported by the evidence. It is alleged that there was a fixed discounted price but such an allegation has not been recorded in the contract signed at the end of February 1996. However, Halleen (PW1) admitted that the contract provided that the price be re-negotiated at each shipment.

[141] The appellant heavily relied on a letter dated 16 April 1996 sent by Zulkifli A Raman as the operation director of the appellant to the respondent bank as reflected at pp 1100 – 1102 of the appeal record at Bahagian 'C' at Jilid 8/15. In that letter, Zulkifli A Raman asked for an LC to be opened for a shipment of cattle from Australia due in the middle of May 1996 based on the negotiated price of RM3.61 perkg. The respondent bank gave notice to cross-evidence Zulkifli A Raman in accordance with the directions given at case management but the appellant did not produce him. It must be borne in mind that the source of the pricing should come from Halleen (PW1). Unfortunately, Halleen (PW1) did not substantiate the pricing although queried. Consequently, since the letter dated 16 April 1996 was challenged, it has no probative value as far as the price of cattle was concerned.

[142] Chandran (PW2) testified as to the cost of cattle. He agreed that the price of cattle would have to be re-negotiated for every shipment. He did not import cattle since the middle of 1995 and so whatever he said about pricing must be regarded as hearsay bearing in mind that Halleen (PW1) did not corroborate his evidence as to the pricing. It must be borne in mind that the appellant did not produce any contemporaneous quotations as to the price of cattle. What the appellant produced was the appellant's own document and Chandran's (PW2's) oral testimony. And what this boils down to is this. That there is no admissible proof before the court on pricing, only self-serving statements by the appellant. It seems that the appellant is merely 'plucking figures out of the air'.

[143] At p 47 of the appeal record at Bahagian 'A', the learned High Court judge had this to say about quantum:

> In the instant case, the evidence relating to quantum was speculative. And whatever said in evidence to support the claim for damages was not within the contemplation of parties. In addition, no prior notice was given immediately to the defendant after the letter dated 26.4.1996 relating to proposed claim against the defendant. No evidence was led to show what steps were taken to mitigate the loss. And the whole evidence on quantum was substantially based on the evidence of PW2 which I have found as unreliable. It is trite that the loss of profits on a contract of which the defendant had no notice is clearly too remote. The statutory enunciation of the rule in Hadley v Baxendale is found in section 74 of Contracts Act 1950. It is my finding that the plaintiff's evidence relating to quantum does not satisfy the rudimentary requirement set out in section 74 to award damages.

[144] Chandran (PW2) insisted on claiming for 2000 cattle per month. But when told that the LC facilities was not even sufficient to cover for 1000 head of cattle, he quickly said that he could use the BG facility notwithstanding that the BG facility was expressly stated to be for the purpose of supporting tenders to government and quasi-government authorities. When re-examined, he

testified that the purchasers would have paid cash on delivery. This, however, was unsupported by any evidence and was a manner of trading which he had never engaged in previously.

[145] An intricate story was advanced by Chandran (PW2) in regard to the 1:1 condition imposed by the letter of the respondent bank dated 26 April 1996. The questions and answers of the affidavit of Chandran (PW2) at pp 236–239 of the appeal record at Bahagian 'B' at Jilid 2/3 merit reproduction:

43. Question: Did the Plaintiff accept the terms as contained in 26th April 1996?

Answer: No.

44. Question: Did the Plaintiff had at any point in time raise objections to these terms?

Answer: Yes.

45. Question: When?

Answer: Sometime end of April 1996 I went to see Mr Lee the Loan Recovery Officer to voice my disagreement on the terms as set out in the letter dated 26th April 1996 and item 1 thereof.

46. Question: What did Mr Lee do when he heard your disagreement?

Answer: He brought me to see the Branch Manager then En Hassan Ali.

47. Question: What transpired at the meeting with En Hassan?

Answer: I voiced out my disagreement to En Hassan Ali.

48. Question: What did the Branch Manager do?

Answer: En Hassan said he could not do anything because this was a decision of the Headoffice and advised me to see En Ainuddin of the Headoffice.

49. Question: Did you meet En Ainuddin and if so what happened?

Answer: Yes. I met En Ainuddin and I explained to him on the need to use the LC facilities to buy livestock because in April 1996 I wanted to bring the cattle shipment for the Hari Raya Haji festival. However En Ainuddin said that the Plaintiff could not use the unutilised portion of the 1,023 Million and if the Plaintiff wanted to use this portion it had to be on a 1:1 basis. It was after this that the 1:1 basis letter was issued on the 26th April 1996.

50. Question: As a result of these terms imposed what losses did the Plaintiff suffer?

Answer: The Plaintiff suffered loss of income as a result of lack of income to import cattle. This resulted in the collapse of the Plaintiff's business which mainly depended on cattle business. As a result of the withdrawal of the facility the Plaintiff was also unable to meet its obligation to supply 500,000 birds (mature chicken) to generate a revenue of RM32 million and thereby lost an average profit of RM1.2 million per year for a period of 5 years from 1996. The Plaintiff also suffered losses in that all its properties charged were taken away by the Bank and also its Fixed Deposit was uplifted.

[146] Chandran (PW2) protested to Mr Lee Leong Chan ('Lee') ('PW3') and then to Ainuddin (DW2). He then confirmed that he had made sure that his evidence was true and when offered the opportunity to re-word the paragraphs in his affidavit, he declined stating that he could remember the events without relying on the documents. When cross-examined by learned counsel for the respondent bank, he continuously contradicted himself as to when these alleged conversations took place. Finally, he admitted that his evidence was inaccurate and he testified that these conversations took place before the issuance of the letter dated 26 April 1996. It is quite obvious that the issue of 1:1 could not have been raised by him when he spoke to Lee (PW3), Hassan and Ainuddin (DW2).

[147] Chandran (PW2) admitted that he was the principal controller of the appellant except for a brief period from the end of 1995 to April 1996. He therefore has to bear the responsibility for the accounts and projections prepared for the benefit of the respondent bank. The appellant's own projections and books are extremely unreliable. The appellant was a non-profitable company which made significant losses. The following write-ups would suffice:

(a) The actual profit made by the appellant in 1992 was RM52,131 (pre-tax) and RM29,131 (post-tax).

(b) But, in order to induce the respondent bank to make available banking facilities the appellant claimed to have made an estimated actual gross profit of RM768,263 and net profit of RM364,703 in 1992.

(c) In 1993, the actual profit made by the appellant was RM47,338 (pre-tax) and RM15,338 (post-tax) on sales of over RM2m.

(d) But, in order to induce the respondent bank to make available banking facilities the appellant projected itself to be making a gross profit of RM1.1m and a net profit of over RM700,000 in 1992.

(e) In 1994, the appellant sustained losses of RM2,157,987 based on sales of RM5,119,249.

(f) But, in 1995 by way of a project paper to support credit facilities for the purpose of building a cold room, the appellant represented that it had made net profits of RM306,000. It must be borne in mind that the cover letter forwarding the project paper was signed by Chandran (PW2) who claim that it was prepared in 1994. But, the covering letter shows that it was in fact forwarded to the respondent bank in the middle of 1995.

(g) From September 1994 to September 1995, the appellant made a loss of RM2,389,648.51. Out of this figure, a sum of RM800,000 was attributable to internal fraud and the rest appears to have been due to competition.

[148] We note that Chandran (PW2) kept changing his evidence on the corporate structure of the appellant and his role therein. At first, when asked by the learned High Court judge who first heard the case, he stated that the appellant had never become a 100% Bumiputera company, but in re-examination he changed his mind and implied that it was. He claimed that he had never resigned as a director of the appellant and that the appellant's own letter dated 20 March 1996 averring to the fact that he had resigned as a director of the appellant was untrue. But, the appellant's own corporate records showed positively that at some point of time he must have resigned as a director because he was re-appointed as a director either on 8 March 1996 or on 13 March 1996.

[149] In his testimony, Chandran (PW2) testified that the price of cattle dropped after 1996. Initially, he admitted that in Ringgit currency the price would have increased because of the collapse of the Ringgit against foreign currencies in 1997. But he immediately changed his mind. However, Halleen (PW1) frankly admitted that the price of cattle went up in 1997. This is certainly consistent with the collapse of the Malaysian Ringgit which was acknowledged by our Federal Court in the case of *Danaharta Urus Sdn Bhd v Kekatong Sendirian Berhad* [2004] 2 MLJ 257; [2004] 1 CLJ 701 where Augustine Paul JCA (later FCJ) writing for the Federal Court aptly said at p 283 (MLJ); p 737 (CLJ) of the report:

> The July 1997 financial and economic crisis which hit Malaysia along with a few other Asian countries were of such severity that countries like Indonesia, South Korea and Thailand sought financial assistance from the International Monetary Fund to salvage their economies. The Malaysian Ringgit, which was trading at RM2.50 to US$1 for long periods prior to July 1997, was particularly affected; falling to RM4.88 to US$1 in January 1998. Share prices of most counters in the Kuala Lumpur Stock Exchange plummeted. Wealth destruction was unprecedented in the nation's history. Non-performing loans due and owing to banks reached a staggering level.

[150] No one can blame Chandran (PW2) if he could not vividly remember events that took place over a decade ago. But Chandran (PW2) insisted that he could remember and refused to admit that he was wrong when confronted with contemporaneous documents which contradicted his testimony. This is the telling part about his evidence.

[151] In regard to the evidence of Lee (PW3), it is quite understandable that he could not remember events that took place nearly 14 years ago. With fading memory, he merely agreed with whatever and whichever counsel was questioning him at the material time. Thus, we have the following scenarios to reckon with:

(a) In Lee's (PW3's) witness statement styled as an affidavit at questions and

answers 96 – 97, he claimed to have seen the Kretam agreement and he said that it had been forwarded to the respondent bank. However, when he was cross-examined, he admitted that he had never seen the Kretam agreement and had no personal knowledge of it after having forwarded it to the respondent bank. In reality, what he knew was from others including from Chandran (PW2).

(b) Again, in Lee's (PW3's) witness statement styled as an affidavit at questions and answers 83 – 88, he vividly gave an account just like what Chandran (PW2) did, of a series of meetings at the end of April 1996 where Chandran (PW2) was said to have objected to the letter dated 26 April 1996. But when it was pointed out to him that Chandran (PW2) had resiled from this line of evidence, he candidly admitted that he could not really remember anything.

(c) In 1996, Lee (PW3) was attached to the respondent bank at Damansara Utama branch as a loan recovery officer (see witness statement styled as an affidavit at question and answer 2 at p 315 of the appeal record at Bahagian 'B' at Jilid 3/3) and he stated that he was put in charge of the appellant's file in 1996. Yet he claimed to have attended meetings in 1995. It must be borne in mind that Lee (PW3) was only involved with this matter in July 1996.

(d) In Lee's (PW3's) witness statement styled as an affidavit at questions and answers 71 – 73, he claimed that only the credit committee 'A' could could have imposed the conditions set out in the letter dated 26 April 1996. However, in cross-examination he admitted that he was unaware that a similar condition had been imposed earlier and he too was unaware whether there was non-compliance with the terms of the letter of offer. In re-examination, he changed his testimony once again.

[152] Chandran (PW2) admitted that the letter dated 26 February 1996 does not change any restructuring of any of the other facilities and is not a new facility but merely a continuation of the original facilities, with some amendments to its terms and conditions. In *Malayan Banking Berhad v P K Rajamani* [1994] 1 MLJ 405; [1994] 2 CLJ 25 (SC), the evidence led showed that the original facility had expired and a letter of renewal was issued by the bank with new terms on interest and security. By way of an affidavit, the bank admitted that the letter of renewal created a new facility. But the Supreme Court held that it was not bound by the labels used by the parties, but had to look at the substance of the matter to ascertain the true meaning and effect of the documents. The Supreme Court looked beyond the terminology used by the parties and held that it was not a new facility but a continuation of the existing facility with some revised terms. Mohamed Dzaiddin bin Hj Abdullah SCJ (later Chief Justice of Malaysia) writing for the Supreme Court had this to say at p 28 (CLJ) of the report:

A

After hearing counsel, we decided to disagree with the learned Judge that the facility given in the letter of 7 March 1986 was a 'new' facility. We said that it was a continuing facility. So, we allowed the appeal with costs and indicated that we would give our reasons, which we do so now.

B

In our view, the learned judge had taken a wrong approach in arriving at his conclusion that the facility given in the letter of 7 March 1986 was a new facility. We think he had been influenced by the contents of the letter and the admission by the appellant that it was a new facility. It is true the said letter described the facility as a 'Renewal of facility'. It may also be true that the appellant had admitted that it had granted to the borrower a new facility of RM60,000 subject to its terms and conditions mentioned therein. We also do not dispute that the prescribed rate of interest is 10% per annum, and therefore different from the first and second facilities of 9% per annum. However, it does not necessarily follow from these facts that the said letter creates a new facility. In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance (*Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131, 133 (FC); *Addiscombe Garden Estates, Limited v Crabbe* (1958) 1 QB 513 (CA)).

C

D

Looking at the substance of the matter, by which we mean the whole loan transaction, the first thing which strikes us is that the said property is still encumbered with the first and second legal charge and has remained so until today.

E

[153] We say that the letter of offer dated 26 February 1996 was a contingent contract within the meaning of ss 32 and 33 of the Contracts Act 1950 (Act 136). Until and unless all the conditions precedent stipulated therein were fully complied with within a reasonable time, no contract came into force.

F

[154] On conditional contract, Lord Jenkins in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 (PC), had this to say at p 50 of the report:

G

This argument rightly stresses the fact that at the very outset of the agreement the vendor's obligation to sell and the purchaser's obligation to buy were by cl 1 expressed to be subject to the condition contained in cl 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.

H

[155] On contingent condition, Salleh Abas CJ (Malaya) had this to say in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 (FC), at p 81:

I

16. Although many judges dislike the use of the word 'condition' because the word is susceptible to a number of senses in which it can be used, authorities have nevertheless established that there are at least two senses in which the word is used. First, it is used in the sense of a condition as opposed to a warranty. Secondly, it is

used in the sense of a contingent condition (precedent or subsequent) as opposed to a promissory condition. See *Anson's Law of Contract*, (24th Ed) pp 130–134). In so far as this appeal is concerned, we are not concerned with the first sense but only with the second meaning. The question is therefore whether the requirement as to FIC approval for completion of the proposed sale is a contingent condition or a promissory condition. A contingent condition, as we have already referred to, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

[156] In the law of contract, the word 'condition' bears many senses and many meanings. According to the case of *Skips A/S Nordheim And Others v Syrian Petroleum Company Limited And Another* [1984] 1 QB 599 (CA), at p 618, 'conditions' is a chameleon-like word which takes its meaning from its surroundings'.

[157] The word 'condition' may conveniently refer either to an event, or to a term of a contract just like the phrase 'conditions of sale' (*Property & Bloodstock Limited v Emerton, Bush And Another v Property & Bloodstock Ltd And Others* [1968] 1 Ch 94 (CA) at p 118).

[158] A condition is an important term 'going to the root of the contract'. A breach of a condition gives the innocent party the option of either terminating the performance of the contract and obtaining damages for his loss caused by the breach, or affirming the contract and recovering damages for the breach (*Hong Kong Fir Shipping Company, Ltd v Kawasaki Kisen Kaisha, Limited* [1962] 1 All ER 474; [1962] 2 QB 26).

[159] Whether a contract is in existence or is operative, may depend upon a contingency. For instance, the operation of a contract may be subject to a condition precedent. Until the condition precedent is fulfilled, the contract is inoperative. A simple straightforward example would be the case of *John Pym v Robert James Roy Campbell, James Thompson Mackenzie and Richard Pastor Pritchard* (1856) 6 El & Bl 370 and there the facts were as follows. The plaintiff wished to sell to the defendant a share in an invention of the plaintiff. A written document appeared to contain an agreement for the purchase. The plaintiff sought to rely upon it but the defendant established that the parties had further agreed that the written document was to be the agreement only if the plaintiff's invention was approved of by a third party, Abernethie. Abernethie had not given his approval of the invention. The court held that there was no contract at all. Abernethie's approval was a condition precedent to the formation of the contract.

[160] Once again, we refer to item 7.5 of the restructured agreement dated 26 February 1996 which is in fact a continuation of the existing facility with some revised terms. Clause 7.5 reads as follows:

> A fresh letter of guarantee duly executed by authorised signatories of the company, stamped and witnessed by our solicitor and submitted to us.

[161] The following personalities were subsequently identified as the persons who would sign the guarantee:

(a) Suhaimi bin Ibrahim ('Suhaimi');

(b) Major General (R) Dato Hj Fauzi bin Hussain ('Fauzi');

(c) Chandran (PW2); and

(d) Zulkifli bin A Rahman ('Zulkifli').

[162] The appellant argues that cl 7.5 has been complied with.

[163] We have seen the guarantee and indemnity and we noted that at p 1064 of the appeal record at Bahagian 'C' at Jilid 8/15, the signatures of Suhaimi, Fauzi, Chandran (PW2) and Zulkifli appeared therein. But we hold that the guarantee and indemnity is not duly executed for the following salient reasons:

(a) It was a requirement of the guarantee and indemnity that the guarantors, when signing, had also to write that they had perfectly understood the contents of the guarantee and indemnity before signing. Sad to say none of the guarantors have done this. Consequently, they cannot therefore be said to have done everything necessary to execute the guarantee and indemnity.

(b) This requirement as above stated was particularly important in the case of Fauzi and Suhaimi whose personal liability would have increased drastically from RM1.5m to RM8.8m without the benefit of any additional credit facilities being advanced to the appellant. Put in another way, once the guarantee and indemnity came into effect, Fauzi and Suhaimi would have automatically become liable for monies already disbursed to the appellant.

(c) Both Fauzi and Suhaimi had second thoughts after signing the guarantee and indemnity. Fauzi withdrew the guarantee on 8 April 1996 and he repeated this on 16 April 1996.

(d) Both Fauzi and Suhaimi are concerned about the increase in their liability. Ainuddin's (DW2's) evidence confirmed this fact and his evidence on this was never challenged.

(e) Both Fauzi and Suhaimi withdrew as guarantors because of the imposition of the 1:1 requirement for new LC/TRs. Three letters would support this assertion, one letter dated 8 April 1996, and two other letters dated 16 April 1996. The respondent bank gave notice to cross-examine the makers in accordance with the case management directions. Since the makers were not produced, these letters lost its lustre in the sense that the truth of their contents cannot be established (*Subramaniam v Public Prosecutor* [1956] MLJ 220).

(f) It was suggested to Ainuddin (DW2) that the consent of the respondent bank was necessary for the revocation of the guarantee and indemnity to be effective. But, it is correct to say that until the guarantee and indemnity was duly executed and delivered to the respondent bank, it could be withdrawn at any time. Even s 83 of the Contracts Act 1950 (Act 136) allows a continuing guarantee to be withdrawn at any time and it limits liability to the amount owing on the date of the withdrawal. What this amounts to is simply this. That even if the guarantee and indemnity had been duly executed, which is denied vehemently by the respondent bank, the guarantors would not be liable for any additional debt incurred on new LCs issued after 8 April 1996.

(g) The guarantee and indemnity is undated (see pp 1065–1066 of the appeal record at Bahagian 'C' at Jilid 8/15). Two pertinent questions must be posed. Firstly, when did the guarantors sign the guarantee and indemnity? Secondly, was the guarantee and indemnity ever delivered to the respondent bank? Chandran (PW2) admitted that the guarantee and indemnity could not have been signed before 1 April 1996. And even as at 15 April 1996, the respondent bank's legal department was still vetting the terms of the guarantee and indemnity. Mr Michael Ching Wing ('Michael Ching') (DW1) acknowledged receipt of the branch's letter of 9 April 1996 enclosing the draft documents for vetting which included the guarantee and indemnity.

(h) The appellant led evidence through Lee (PW3) that by the time the amendments to the guarantee and indemnity were received at the branch, the appellant had given instructions to the branch manager to KIV the matter. So, we have the situation that the matter was kept in abeyance. And since the parties were not ad idem, no contract came into existence.

(i) The guarantee and indemnity is not stamped. All legal fees and stamp duties are to be borne by the appellant and the appellant knew about this. And yet nothing was done to stamp the guarantee and idemnity and pay the legal fees.

[164] The appellant knew and understood that at all material times the restructuring of the overdue TRs into a term loan had not come into force because of the failure of the appellant to comply with the conditions precedent.

There were two letters emanating from the respondent bank to the appellant dated 2 April 1996 and 2 May 1996. These two letters requested the appellant to pay the overdue TRs. But the appellant played possum and did not reply to these two letters. If the appellant believed that it had complied with the conditions precedent and that the overdue TRs had been restructured into a term loan, the appellant would definitely have responded and wrote back to the respondent bank challenging these two letters.

[165] We will now reproduce these two letters. The letter dated 2 April 1996 can be seen at pp 1089–1090 of the appeal record at Bahagian 'C' at Jilid 8/15. It was worded as follows:

"Date: 2nd April 1996

Re: OVERDUE TRUST RECEIPTS TOTALLING RM4,650,166-09

The above matter refers.

We append below details of statement for Overdue Trust Receipts as at 31st March, 1996 for your perusal:-

NO:	TR NO:	AMOUNT (RM):	INTEREST TO 31-03-95	TOTAL:
1)	12295035	$ 294,000-00	$ 31,060-07	$ 325,060-07
2)	12295042	$ 400,000-00	$ 41,716-16	$ 441,716-16
3)	12295049	$ 205,200-00	$ 15,201-25	$ 220,401-25
4)	12295043	$ 534,302-81	$ 55,342-07	$ 589,644-88
5)	12295047	$1,337,738-59	$131,241-32	$1,468,979-91
6)	12295064	$ 935,074-03	$ 78,105-58	$1,013,179-61
7)	12295080	$ 73,690-08	$ 5,463-96	$ 79,154-04
8)	12295088	$ 870,160-58	$ 59,163-77	$ 929,324-35
		$4,650,166-09	$417,294-18	$5,067,460-27

We would appreciate if you could settle the above Overdue Trust Receipts as soon as possible.

Thank you."

[166] And the letter dated 2 May 1996 can be seen at pp 1107–1108 of the appeal record at Bahagian 'C' at Jilid 8/15. It was worded in this way:

"Date: 2nd May 1996

Re: OVERDUE TRUST RECEIPTS TOTALLING RM4,650,166-09

The above matter refers.

We append below details of statement for Overdue Trust Receipts as at 30th April, 1996 for your perusal:-

NO:	TR NO:	AMOUNT (RM):	INTEREST TO 30-04-96	TOTAL:
1)	12295035	$ 294,000-00	$ 33,983-96	$ 327,983-96
2)	12295042	$ 400,000-00	$ 45,694-24	$ 445,694-24
3)	12295049	$ 205,200-00	$ 17,242-01	$ 222,442-01
4)	12295043	$ 534,302-81	$ 60,655-82	$ 594,958-63
5)	12295047	$1,337,738-59	$144,545-41	$1,482,284-00
6)	12295064	$ 935,074-03	$ 87,405-08	$1,022,479-11
7)	12295080	$ 73,690-08	$ 6,196-82	$ 79,886-90
8)	12295088	$ 870,160-58	$ 67,817-70	$ 937,978-28
		$4,650,166-09	$463,541-04	$5,113,707-13

We would appreciate if you could settle the above Overdue Trust Receipts as soon as possible.

Thank you."

[167] It is significant to note that these two letters were addressed to the appellant for the attention of Chandran (PW2).

[168] We will now revert to item 7.4 of the restructured agreement dated 26 February 1996 which is in fact a continuation of the existing facility with some revised terms. Clause 7.4 makes reference to the SFA and it is the stand of the appellant that the SFA had been executed by way of affixing the common seal of the appellant to it. But the crucial question to pose would be this. Was the SFA duly executed, dated, stamped and delivered to the respondent bank?

[169] Now, the SFA can be seen at pp 1043–1049 of the appeal record at Bahagian 'C' at Jilid 7/15 spilling over to p 1050 of the appeal record at Bahagian 'C' at Jilid 8/15.

[170] At p 1043 of the appeal record at Bahagian 'C' at Jilid 7/15, the SFA is not dated. And at the last page of the SFA which is at p 1050 of the appeal record at Bahagian 'C' at Jilid 8/15, the seal of the respondent bank is nowhere to be seen and no signature of the respondent bank can be seen.

[171] Chandran (PW2) in his affidavit in reply affirmed on 18 July 1997 in relation to the Kuala Lumpur High Court Originating Summons No: S5–24–405 of 1997 as seen at pp 1245–1251 of the appeal record at Bahagian 'C' at Jilid 9/15 produced to the court an undated SFA signed on behalf of the appellant as seen at pages 1292–1299 of the appeal record at Bahagian 'C' at Jilid 10/15. But this SFA does not carry the seal of the respondent bank and there is no signature of the respondent bank on it. And Chandran (PW2) too did not clarify in his affidavit in reply as to when the SFA was actually signed by the appellant's directors.

[172] Michael Ching (DW1) affirmed an affidavit on 11 September 2009 which was used as a witness statement as seen at pp 249 – 265 of the appeal record at Bahagian 'B' at Jilid 2/3 and he categorically said, inter alia, that as at 15 April 1996 the terms of the SFA were still being vetted. He too confirmed that the documents sent to him on 9 April 1996 by the branch were drafts for vetting.

[173] The appellant led evidence through Lee (PW3) that by the time amendments had been received at the branch, the appellant had given instructions to the branch manager to KIV the matter (see the witness statement of Lee (PW3) styled as an affidavit at pp 314 – 343 of the appeal record at Bahagian 'B' at Jilid 3/3, in particular to questions and answers 67 and 68). This piece of damning evidence cannot be ignored by us. Fauzi himself as the appellant's managing director repeatedly instructed that the guarantee would be withdrawn. Thus, it appears that the appellant must have simply signed the draft agreement prepared by the solicitors.

[174] There is a letter dated 20 July 1996 from the respondent bank to the appellant conveying the message that the SFA has not been signed by the appellant's board of directors. That letter can be seen at p 1120 of the appeal record at Bahagian 'C' at Jilid 8/15 and it was worded as follows:

"20th July 1996

RE: BEKALAN SAINS P & C SDN. BHD. – NPL
A/C NO: 01-122-02031-88
BRANCH: DAMANSARA UTAMA.

We refer to the above matter.

We regret to note that till todate the supplementary agreement on the approved restructuring of the credit facilities has not been signed by your Board of Directors.

Before the bank proceed(s) with its next course of action, we would like to convene a meeting with your Board of Directors including YB Suhaimi Ibrahim at our premise in the presence of our Senior General Manager.

Please call the undersigned to fix for an appointment date suitable for both parties.

Your immediate attention is highly appreciated.

Thank you."

[175] It must be borne in mind that the appellant never disputed this letter at all.

[176] Our attention was drawn to a letter dated 19 March 1996 from the solicitors Messrs Nordin Yusoff & Co addressed to the respondent bank. Using this letter, it was argued that the SFA was already with the respondent bank by that date. A perusal of this letter shows that the solicitors requested for the 'original Facility Agreements' and not the SFA. Such a request by the solicitors has something to do with a basic conveyancing practice. Now, under the Stamp Act 1949 (Act 378), a new or an increased credit facility is stamped ad valorem. Whereas a document which merely restructures or amends existing facilities is stamped on a flat rate basis. The solicitors requested for the 'original Facility Agreements' in order to take advantage of the stamping cost. It must be recalled that even as at 9 April 1996 the branch was still sending draft documents to the legal department for vetting. We will now reproduce the letter dated 19 March 1996 which is found at p 1083 of the appeal record at Bahagian 'C' at Jilid 8/15 for the sake of completeness:

"19th March, 1996

RE: RESTRUCTURING OF FACILITIES TOTALLING RM8.8 MILLION
BORROWER : BEKALAN SAINS P & C SDN BHD

We refer to the above matter and to the tele-conversation between your Cik Fariyal and our Mr. Hithi on even date.

We would be obliged if you could kindly release to us the original Facility Agreements covering the abovementioned facility for stamping purposes and our further action.

We undertake to return same to your Bank for safe-keeping upon completion of stamping.

Thanking you."

[177] We have reproduced, earlier in this judgment, the internal memorandum of the respondent bank dated 10 February 1996. It bears the signature of Ainuddin (DW2), the then head of the NPL management of the respondent bank. It also made specific reference to a number of attachments. It also bears out the fact that the cattle business is the major business of the appellant.

[178] The internal memorandum of the respondent bank dated 10 February 1996 sets out under several sub-headings such as the 'proposed new restructuring' and the 'comments' and the 'Recommendation'. It sets out the reasons as to why the appellant's proposal for such a restructuring merits the consideration of the respondent bank.

[179] The internal memorandum of the respondent bank shows the proposal by the appellant to pay interest of RM15,000 a month with effect from 1 January 1996 and any shortfall would be set off against the fixed deposits pledged by the appellant. This very proposal of the appellant was incorporated as item 5(ii) of the restructured agreement dated 26 February 1996 which we now consider to be a continuation of the existing facility with some revised terms.

[180] We must reiterate that as at 8 April 1996, the appellant failed to service the interest at RM15,000. Even the terms of the fresh guarantee and the SFA were not finalised yet. The conditions precedent have not been fulfilled.

[181] We acknowledge that we are dealing with a banker customer relationship where the bank has the upperhand. We also acknowledge that the respondent bank must have been satisfied with the viability of the project and the prospect that the appellant would be making enough money to pay off its debt. We further acknowledge that unless and until the appellant could prove to the respondent bank that it could repay RM8.8m the respondent bank would not have approved the restructured facility as a continuation of the existing facility.

[182] An interpretation of a loan document may sometimes be in favour of a bank. Thus, if the borrower fails to service the monthly interest of a loan facility, the bank is entitled to withhold the drawdown of the balance of the loan sum. This was the scenario in the case of *Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293; [2005] 1 CLJ 501 (CA). Nik Hashim JCA (later FCJ) delivering the judgment of this court had this to say at pp 301-302 (MLJ); p 509 (CLJ) of the report:

> Thus, to our mind, the learned judge was right in his finding that the failure to service the interest on monthly basis comes within the scope of events of default under section 16.01. We are of the further view that the words 'any sum due' under section 16.01(1)(a) mean to include interest. Such being the case, the 1st appellant's complaint over the withholding or delay in releasing the drawdowns by the respondents was not without justification. The respondents did not refuse to allow drawdowns to be made to the 1st appellant. The respondents merely required fulfillment of conditions of drawdowns before releasing drawdowns to the 1st appellant. That course of action adopted by the respondents was prudent and which every banker and lender would adopt in order to protect their interests. In that event, the respondents were not in breach of the letter of offer and the loan agreement.
>
> If it was the intention of the parties that there be no need to service the loan by payment of monthly interest in arrears, then the loan agreement would surely not have been drawn up and executed in the format as it now exists. If that was the intention, then the whole loan of RM5.2 million would have been released to the

first appellant and the first appellant would only be required to pay the RM5.2m with interest thereon at the end of the loan period. But that was not the intention or arrangment in the instant case.

[183] This court in *Lim Chee Holdings Sdn Bhd v RHB Bank Bhd* [2005] 6 MLJ 497; [2005] 4 CLJ 305 has upheld the right of a bank to withhold further drawdown when a borrower has breached its obligation to pay interest.

[184] The claim of the appellant is fashioned on a breach of the restructured facility agreement dated 26 February 1996 and consequent thereto the appellant claims for loss and damages arising from the respondent bank's breach of contract. The appellant seeks damages in the sum of RM21,528,000 against the respondent bank.

[185] Every day, damages are awarded by the courts to claimants in order to compensate them for loss and damage. But before damages can be recovered in an action there must firstly be a wrong committed, whether the wrong be a tort or a breach of contract. If a loss has been incurred by the claimant, no damages can be awarded unless there is a wrong. According to Lord Wright in *Hay or Bourhill v Young* [1943] AC 92, at p 106:

> Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is damnum absque injuria. The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff

[186] So the crucial question to pose is this: whether a wrong has been committed? At the end of the day, even if no loss has been incurred, nominal damages will be awarded if a wrong has been committed.

[187] The purpose of awarding damages is to give the claimant compensation for the damage, loss or injury that he has suffered. Lord Blackburn in *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 (HL) at p 39, defined damages as:

> ... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[188] Lord Diplock in *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, at p 841, said:

> ... to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so.

[189] The person who is claiming damages must prove his case. Thus, the claimant in order to justify an award of substantial damages he must satisfy the court as to the fact of damage and as to its quantum (*Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (Formerly STC Submarine Systems Ltd)* [1999] 2 Lloyd's Law Reports 423 (CA)). If the claimant fails to satisfy the court on the fact of damage and quantum, then his action must fail or at the very least he would be awarded nominal damages where his right has been infringed.

[190] Put in another way, the claimant must show actual loss and evidence must be led in that direction. It is submitted that the appellant has failed to prove damages with precise evidence (*Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611, (CA); and *Ban Chuan Trading Co Sdn Bhd & Ors v Ng Bak Guan* [2004] 1 MLJ 411; [2003] 4 CLJ 785, (CA)) and that the appellant has also failed to lead evidence to show actual loss.

[191] It is also submitted on behalf of the respondent bank that self-serving statements by the appellant's own officers have no probative value unless supported by tangible evidence from independent witnesses. We were urged to consider that here there was no expert evidence or evidence from independent third parties to prove the lost profits (*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 (FC); *Popular Industries Ltd v The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635 (HC); and *Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Anor* [1993] 2 MLJ 76; [1993] 2 CLJ 495 (SC)).

[192] The appellant's amended statement of claim at para 19 with the particulars listed thereto together with para 20 are now reproduced for convenience (see pp 61–62 of the appeal record at Bahagian 'A'):

"19. Accordingly the Defendant is liable to the Plaintiff for loss and damages flowing from the Defendant's breach of contract.

PARTICULARS

a. (i) The Plaintiff had negotiated an agreement with KHB Foodlink Sdn Bhd, a subsidiary of Kretam Holdings Berhad to supply 500,000 birds (matured chicken) a month. The annual sales turnover was expected to reach RM32 million in 1997 and an average profit of RM1.2 million per year for 5 years.

(ii) Loss of income for 5 years at RM1,200,000.00
(RM1,200,000.00 per year x 5 years =
RM6,000,000.00)
Wherefore the Plaintiff loss here is RM6,000,000.00

b. (i) The Plaintiff entered into a contract with an Australian Cattle Supplier in February 1996.

b. (ii) The loss of profit is as follows:-

i. 1 month 2 deliveries
Each delivery Net Profit RM106,400.00
(RM106,400.00 x 2 per month x 12 Months
=RM2,553,600.00 x 5 years= RM12,768,000.00

Total loss for 5 years RM12,768,000.00

c. Loss from the Value of Property Pledged RM 2,010,000.00
d. Loss from the Uplifting of the fixed deposit RM 750,000.00

RM21,528,000.00

20. The Plaintiff claims the loss of the amount set out in paragraph 19 as damages from the Defendant.

Wherefore the Plaintiff prays judgment as follows:-

a) Judgment in the sum of RM21,528,000.00 against the Defendant;

b) Interest thereon at 8% per annum from the 26th of February 1996 to date of payment;

c) Costs of this action;

d) Any other relief that this Honourable Court deems fit."

[193] The respondent bank's re- amended the statement of defence at para 8.1 onwards are hereby reproduced for convenience (see pp 95–100 of the appeal record at Bahagian 'A'):

7.4 In view of the matters set out above, the Defendant states that the alleged restructuring agreement never came into effect, or even if there was a valid and effective agreement (which is denied), the Plaintiff had breached its obligations. Accordingly, paragraph 16 of the Statement of Claim is denied.

8.1 The Defendant denies that the Plaintiff suffered loss and damages of the kind and to the extent as alleged in paragraphs 19 and 20 of the Statement of Claim or at all. The Defendant further denies any knowledge or understanding of the manner in which the alleged loss and damages allegedly suffered by the Plaintiff

(which is denied) is computed. The Defendant states that:

(a) The Plaintiff was at all material times a poorly managed company which was unprofitable. Given its history of mismanagement, the Plaintiff could not have achieved the profits claimed in paragraphs 19(a) and 19(b) of the Amended Statement of Claim. As such, the Plaintiff's claim in this regard is without any basis;

(b) As late as in December 1995, the Plaintiff's only business was to supply cattle. In applying for the banking facilities, the Plaintiff had made grandiose predictions as to the profits it would make from its business but they were overly optimistic and never made any profits;

(c) As the Plaintiff suffered losses from its business supplying cattle, in or around September 1995, the Plaintiff attempted to diversify its business to also supply poultry to a company known as Kretam Holdings Berhad ('Kretam');

(d) The Plaintiff did not reach any agreement with Kretam or any of its subsidiaries for the supply of poultry. As such, the Plaintiff's claim in paragraphs 19(a)(i) and 19(a)(ii) of the Amended Statement of Claim are without any basis and are purely speculative.

(e) Further and in any event, the Plaintiff had utilised all or almost all of the banking facilities granted by the Defendant to the Plaintiff for the importation of livestock. There was insufficient sums remaining under the banking facilities granted for the Plaintiff's purpose of importation of livestock.

Particulars:

(i) Of the total banking facilities granted by the Defendant to the Plaintiff, only the RM4,000,000.00 Letter of Credit/Trust Receipt facility granted by the Letter of Offer dated 14.07.1994 was specifically designated for the purpose of importation of livestock;

(ii) The remaining banking facilities were specifically designated for other purposes;

(iii) The Plaintiff had utilised Trust Receipts amounting to RM3,882,475.90. The relevant Trust Receipts are numbered 12295043, 12295047, 12295049, 12295083/64 and 12295088/120;

(iv) As such, only RM117,524.10 of the remaining banking facilities granted to the Plaintiff were designated for the purpose of the importation of livestock.

(v) Even if the Plaintiff was entitled to utilise the remaining banking facilities, which the Defendant denies, the Plaintiff would not have been entitled to utilise any sums in excess of the said RM117,524.10 to import livestock; and

(vi) As such, the Plaintiff would not have been able to generate the profits set out in paragraphs 19(a) and 19(b) of the Amended Statement of Claim; and

(f) In the circumstances, the Plaintiff's claim is vexatious and frivolous.

8.2 Further or alternatively, the Plaintiff is not entitled to and cannot claim the relief prayed for in paragraph 20(a) of the Statement of Claim. The Defendant further contends that the Plaintiff cannot be awarded damages for loss of profits, being pure economic loss not consequent upon any physical damage to property.

9. Save and except as hereinbefore specifically admitted, the Defendant denies each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15(a), (b), (c), (d), (e), (f), 16, 17, 18, 19(a), (b), (c), (d), 20(a), (b), (c), (d) of the Statement of Claim as if the same were hereinbefore specifically set forth and traversed seriatim.

10. Wherefore the Defendant prays that the Plaintiff's claim be dismissed with costs.

[194] We note that this is not a case where banking facilities were given on the basis of some detailed projections prepared by experts where the respondent bank has carefully studied the experts' projections and relied on them as the basis for giving loans to the appellant. Here, we are dealing with a restructured loan which is in fact a continuation of the existing facility with some revised terms. Banking facilities were accorded to the appellant by the respondent bank way back in 1993. It was a long time ago. And the appellant had already defaulted on the banking facilities and it is somewhat puzzling that the respondent bank had not pursued any legal action against the appellant. Instead, the respondent bank gave another chance to the appellant to repay the overdue TRs over an extended period of time.

[195] Perhaps, motivated by political intervention and with the hope that the appellant would be able to finalise a contract with Kretam for poultry, the respondent bank gave the appellant another chance. But, unfortunately, events have shown that the poultry venture never took off.

[196] The projections made in 1993–1995 in order to induce the respondent bank to grant the banking facilities were misleading and grossly inaccurate. Even when the February offer was issued, the appellant was unable to make profit.

[197] We have set out in extenso the losing ventures of the appellant when examining the evidence of Chandran (PW2) and we need not regurgitate them again. Suffice to say that significant losses were incurred by the appellant.

[198] In its re-amended defence, the respondent bank rightly described the appellant as having made 'grandiose predictions as to the profits it would make from its business but they were overly optimistic and never made any profits'.

[199] Actual loss of profit must be shown and not projected loss of profit. The price of cattle is so uncertain. For each shipment the price of cattle has to be re-negotiated. Since the middle of 1995, Chandran (PW2) stopped importing cattle. And so there was no actual loss of profit.

[200] Abdul Malik bin Ishak JCA writing a dissenting judgment in *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & 353 Ors* [2009] 4 MLJ 610 , at pp 665–666; [2009] 5 CLJ 1 at pp 62–64; [2010] 1 AMR 285, at pp 329–330, had this to say about claiming damages:

[90] All the 354 respondents plaintiffs are claiming damages and they must prove them. *McGregor on Damages*, (16th Ed), at p 236 sets out the law on damages in this way:

> 'A PLAINTIFF claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v Deveridge* [1825] 2 C & P 109 and *Twyman v Knowles* (1853) 13 CB 222.

[91] Of course, if a particular plaintiff has suffered damage that is not too remote, he must be restored, so far as money can do it, to the position he would have been in had that particular damage not occurred (*Robinson v Harman* [1848] English Reports 1541 Ex 850; *Sally Wertheim v Chicoutimi Pulp Company* [1911] AC 301 at p 307, (PC); *The 'Edison'* [1933] Lloyd's List Law Reports Vol 45 No 5, at pp 128–129, and *Sunley (B) And Co, Ltd v Cunard White Star, Limited* [1940] 1 KB 740at p 745).

[92] In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, Edgar Joseph Jr J (as he then was) spoke of the general principles governing damages in these erudite terms (see p 366 of the report):

> A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same (see *Koufos v Czarnikaw Ltd (The Heron II)* [1969] 1 AC 350).

[93] Continuing at p 369 of the report, His Lordship Edgar Joseph Jr J (as he then was) had this to say:

'In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17, namely, that:

> The plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

Accordingly, all I can do is to make an award of nominal damages of US$500 that being the currency of the contract (see *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487) which I hereby do.'

[94] In *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, Edgar Joseph Jr FCJ, speaking for the Federal Court, again quoted, with approval the passage from Lord Goddard in *Bonham Carter v The Hyde Park Hotel, Ld* [1948] WN 89.

[95] Finally, Abdul Malek Ahmad, JCA (who later rose to be the President of the Court of Appeal) in *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65, at p 85 had this to say:

> As to the question whether the defendant has proved its loss, the learned trial judge said that the law is clear that the burden of proving both the facts and the amount of damages lies on the person seeking damages before he can recover them, citing *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 and *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

[96] The primary purpose of awarding damages is to compensate the aggrieved party for the harm done to him. Whereas the secondary purpose of awarding damages is to punish the wrongdoer and this is done by imposing what is known as exemplary damages or punitive damages or vindictive damages or retributory damages (*Bell v The Midland Railway Company* (1861) ER 142, 10 CB (NS) 287 at p 308; *Cassell & Co Ltd v Broome And Another* [1972] AC 1027; and *Rookes v Barnard And Others* [1964] AC 1129).

[201] Continuing at p 65 of the CLJ report, pp 667–668 of the MLJ report and at pp 331–332 of the AMR report, this was what His Lordship said:

[100] It can be surmised that the learned judge of the High Court had accepted wholesale the testimony of SP3 Tuan Fakhrur Razi bin Tuan Yusof in regard to the respondents plaintiffs' claim for damages. His Lordship accepted the testimony of SP3 that the alleged discrepancy in the price of oil palm fruit bunches per tonne at the rate of RM250 per tonne when there was no documentary evidence for this amount for three years from 1997–2000 before the learned judge. I wonder where did SP3 get the rate of RM250 per tonne from. It seems to me that SP3 wrote down the figure of RM250 per tonne, so to speak, and threw them before the learned judge of the High Court and asked to

be given that amount without proving it. That cannot be right.

[101] In fact, there was no documentary evidence before the learned judge of the High Court to support the actual loss or estimated loss suffered by each individual respondent plaintiff.

[102] The learned judge of the High Court also failed to take into account the failure of learned counsel for the respondents plaintiffs to call each individual respondent plaintiff to give evidence of the actual loss alleged to be suffered by each individual respondent plaintiff bearing in mind that individually each of them would have suffered a different quantum of loss. It must be borne in mind that individually each of them may have different grades of fruits that have been harvested.

[103] For all these reasons, the learned judge of the High Court misdirected himself during the course of the trial and he failed to 'judicially appreciate the evidence' that was put before him.

[202] Halleen (PW1) testified that there was no fixed price for the cattle and that the price would be negotiated at each shipment. And this was admitted by Chandran (PW2).

[203] Halleen (PW1) knows the pricing. But, he did not substantiate the figure advanced by the appellant although he was queried. Halleen (PW1) did not corroborate Chandran (PW2) as to the price of cattle.

[204] There is an analysis of the appellant's business dated 29 September 1995 enclosing the report of the financial status of the appellant as seen at pp 958–961 of the appeal record at Bahagian 'C' at Jilid 7/15.It is not that encouraging. The sale of imported beef to abattoirs at the market place resulted in heavy losses. Losses incurred from September 1994 to 26 September 1995 came up to RM2,389,648.51.

[205] Thus far there is no admissible proof as to pricing. What we have is the self-serving statements of the appellant. It is just like 'plucking figures out of the air'.

[206] In order to prove the existence of a market for cattle and the market value of cattle, the appellant must call independent experts to testify by giving the basis of the valuation just like what was done in *Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Anor*; or the appellant must call the customers to testify as to the price they were prepared to pay; or, at the very least, the appellant has to produce evidence in the form of long-term contracts. It is pointless for the appellant to give oral evidence as to the price that he would have obtained because that would be self-serving (*Popular*

Industries Ltd v The Eastern Garment Manufacturing Co Sdn Bhd; and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19 (HC)).

[207] We must categorically say that the appellant failed to call independent witnesses or produced any documents in order to verify:

(a) the price at which the appellant would have bought the beef from May 1996;

(b) the local costs incurred such as landing fees, abattoirs, storage fees, etc; and

(c) the market price for a large volume of beef at any one time.

[208] There must be sufficient data for the court to assess damages. Now, by the time the February offer was made the appellant had represented that it was changing its business to supply chickens. It seems that the source of repayment of the loan was to be the appellant's proposed chicken business. The appellant repeatedly asserted that it would be able to secure the Kretam contract and repay the loan to the respondent bank. But the respondent bank was not asked to finance the Kretam project. Bank Pertanian was the financier for the Kretam project.

[209] In order to prove the claim for poultry, the appellant must lead evidence to show:

(a) *The cost of obtaining the poultry*. But, unfortunately, no evidence was led as to the cost of rearing poultry. This claim should be dismissed.

(b) *The existence of the market for the poultry*. In determining this head, we have to look at the Kretam project. However, there was no admissible evidence to show that the Kretam project was ever signed and the Kretam contract too was not tendered in court. Section 64 of the Evidence Act 1950 (Act 56) enacts that documents must be proved by primary evidence and so the production of the Kretam contract must be tendered in court and oral testimony is insufficient. In the absence of the Kretam contract or of evidence why it could not be produced, all secondary evidence of its contents, whether in other documents or by way of oral testimony, must be rejected (*Popular Industries Ltd v The Eastern Garment Manufacturing Co Sdn Bhd*).

(c) The market price of the poultry. It is rather unfortunate that there was no evidence to show the price at which the birds could have been sold.

[210] In regard to the issue that the respondent bank caused the loss of the poultry contract, we have this to say. It is not a situation where the respondent

bank withdrew funds for a project which it had agreed to finance. In fact, it is the appellant who had represented to the respondent bank that the chicken venture was to be financed by Bank Pertanian. The simple reason why the Kretam project was brought to the attention of the respondent bank was because the appellant represented that if they got the Kretam contract then the proceeds of the Kretam contract would be used to repay the respondent bank. Furthermore, the imposition of the 1:1 condition for the issuance of the LCs could not have any impact on the chicken project and there were no suggestions to the respondent bank that this would be so. We hold that the damages claimed for the loss of the Kretam contract are far too remote given the fact that the financing of the Kretam contract came from Bank Pertanian and not the respondent bank.

[211] In regard to the charged land, we must say that this claim for damages under this head must be dismissed. The appellant claims to have suffered loss from the sale of the charged properties at an undervalue charged to the respondent bank for the purpose of securing the banking facilities. But the proprietor of all the properties was Chandran (PW2) and not the appellant. Thus, any loss, if any, could not be sustained by the appellant but rather by Chandran (PW2). Moreover, no evidence was led to show that the market value of the properties on the dates of sale were any different from the prices obtained. No evidence too was led to show that the delay in selling the properties would have resulted in higher prices. At any rate, the following year, the country went into a deep recession (*Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*).

[212] In regard to the *fixed deposits*, we have this to say. It is used by the respondent bank to settle the appellant's debts. It was always intended that the *fixed deposits* would be applied to settle the outstandings owed to the respondent bank. It must be borne in mind that the appellant consented to the upliftment of the *fixed deposits* in July 1996. We say that it is inconsistent on the part of the appellant to allege that the respondent bank breached the contract by not uplifting the *fixed deposits*, while, on the other hand, sue the respondent bank for uplifting the fixed deposits. The claim for damages for upliftment of the fixed deposits has no basis in law. It should be dismissed.

[213] In addressing the issue of mitigation, there is no evidence that the appellant took any steps to mitigate its alleged losses by seeking financing elsewhere. We are aware of the practical realities of a borrower in the harsh world of finance as sounded by the Federal Court in *Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Anor*. But here, not a single letter seeking financing from any other financial institution was produced by the appellant. There was not even a suggestion by Chandran (PW2) that he or any other officer of the appellant had attempted to seek an alternative financing

from other banks or financial institutions. The events that happened in this case took place in early 1996, well over a year before the July 1997 financial crisis started.

[214] The appellant is duty bound to take all reasonable steps to mitigate the loss suffered consequent upon the respondent bank's purported breach of contract. Yet the appellant did not do so. Viscount Haldane LC in *British Westinghouse Electric And Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited* [1912] AC 673 (HL) at p 689 aptly said:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[215] Pearson LJ in *Darbishire v Warren* [1963] 1 WLR 1067 (CA), expressed the meaning behind the phrase 'duty to mitigate the loss' in these erudite terms (see p 1075):

> ... it is important to appreciate the true nature of the so-called 'duty to mitigate the loss' or 'duty to minimise the damage'. The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant.

[216] For the reasons given above, we dismiss the appellant's appeal with costs of RM200,000. We affirm the decision of the learned High Court judge.

Appellant's appeal dismissed with costs.

Reported by Kohila Nesan